EXHIBIT LIST

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Exhibit 1

Timeline of Minnesota Public Utilities Commission Vonage Proceeding

Minnesota Public Utility Commission Vonage Case Timeline

December 2002–July 2003 – Minnesota Department of Commerce ("DOC") investigation of Vonage's business activities.

July 15, 2003 – DOC files a complaint against Vonage before the Minnesota Public Utilities Commission ("PUC"), alleging that Vonage provides telephone service in Minnesota without the authorization required therefor under State law. DOC requests "interim relief" in the form of an order directing Vonage to stop soliciting new customers and to file a 911 emergency services plan in advance of a hearing on the merits of the Complaint.

July 22, 2003 – Vonage submits "Response" to the complaint for interim relief.

July 24, 2003 – the PUC votes to deny the DOC's request for temporary relief.

July 30, 2003 – Vonage formally Answers Complaint and files Motion to Dismiss.

Aug. 1, 2003 – PUC issues Order Denying Temporary Relief (finding that it is "unable to conclude, based on the present record, that the DOC is likely to succeed on the merits of its claim, that temporary relief is necessary to protect the public's interest ... or that the relief sought is technically feasible" and that it is "unable and unwilling to make any conclusions regarding [its] jurisdiction" over Vonage's service—*e.g.*, whether Vonage offers a telecommunications service potentially subject to regulation or an Internet information service—"without further record development").

Aug. 5, 2003 – Commission Agenda Order.

Aug. 13, 2003 – Commission holds hearing at which it votes to regulate Vonage.

Sep. 11, 2003 – Commission issues Regulation Order.

Exhibit 2

Complaint of the Minnesota Department of Commerce, Request for Temporary Relief, Request for and Expedited Hearing, Docket No. P6214/C-03-108 (filed Jul. 15, 2003).

PUBLIC DOCUMENT -- TRADE SECRET DATA HAS BEEN EXCISED

FOR THE MINNESOTA PUBLIC UTILITIES COMMISSION

SUITE 350 121 SEVENTH PLACE EAST ST. PAUL, MINNESOTA 55101-2147

LeRoy Koppendrayer Gregory Scott Marshall Johnson Phyllis A. Reha

Chair Commissioner Commissioner Commissioner

COMPLAINT OF THE MINNESOTA DEPARTMENT OF COMMERCE

REQUEST FOR TEMPORARY RELIEF

REQUEST FOR AN EXPEDITED PROCEEDING

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)	Docket No. P6214/C-03-108
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INTRODUCTION

This is a Complaint and Request for Temporary Relief brought by the Minnesota Department of Commerce ("Department") against Vonage Holding Corporation ("Vonage"). This Complaint, in summary, maintains that Vonage has offered and continues to furnish telephone services in Minnesota, including local exchange service and long distance service, without first obtaining a certificate under Minn. Stats. §§ 237.16 and 237.74, for those services. The Department further alleges that the manner in which Vonage provides local service violates Minnesota law in that it fails to provide adequate 911 service. Additionally, Vonage did not file a tariff containing all terms and conditions regarding its services.

In support of this Complaint, the Department alleges:

PARTIES

1. The Department's local address in Minnesota is Golden Rule Building, 85 East 7th Place, Suite 500, St. Paul, MN 55101-2198. The Department is represented in this proceeding by its attorney:

Steven H. Alpert Assistant Attorney General 525 Park Street, Suite 200 St. Paul, Minnesota 55103-2106 (651) 296-3258 (telephone)

2. Respondent Vonage is a corporation with its principal place of business at 2147 Route 27, Edison, NJ 08817. The Department believes that Vonage is represented by its attorney:

Russell M. Blau Swidler Berlin Shereff Friedman, LLP 3000 K Street NW, Suite 300 Washington, DC 2007-5116 (202) 424-7835 (telephone)

JURISDICTION

- 3. Under Minn. Stat. § 216A.07, the Department is charged with investigating and enforcing Chapter 237 and Commission orders made pursuant to that chapter. The Department's investigation into uncertificated local and long distance services, described more particularly below, establishes that Vonage's behavior violates state law.
- 4. The Minnesota Public Utilities Commission ("Commission") has authority under Minn. Stat. § 237.081 to investigate each of the Department's claims that Vonage is unlawfully providing telephone service and to order further proceedings under Minn. Stat. § 237.461 (enforcement) and § 237.462 (competitive enforcement; administrative penalty orders). Further, the Commission has specific authority under Minn.Stat. § 237.462, subd. 7 to grant the Department's request for temporary relief pending dispute resolution, and under § 237.462, subd. 6 to grant the request for an expedited proceeding.

FACTUAL BACKGROUND

THE OFFERING OF LOCAL AND LONG DISTANCE SERVICE

5. On December 23, 2002, the Department was alerted to a company that was advertising the offering of local and long distance service to Minnesota consumers. The company in question, Vonage, stated on its website that "Vonage Digital Voice is an all-inclusive home phone service that replaces your current phone company." (Exhibit 1) As also

listed on Exhibit 1, Vonage characterizes itself as "The BROADBAND Phone Company." The website confirmed that Vonage Digital Voice was being offered in parts of Minnesota. (Exhibit 2)

- 6. Vonage's website advertised other features typically offered with traditional local wireline telecommunications service, including local number portability. The website also offered end users the ability to choose a telephone number. (Exhibit 2)
- 7. On January 3, 2003, the Department sent a letter to Vonage, inquiring about Vonage's offering of local and long distance telephone service in Minnesota. The Department also noted that to offer telephone service in the state, Vonage would be required to apply for a certificate of authority with the Commission and comply with all applicable legal requirements, including the provision of 911 service. (Exhibit 3)
- 8. On January 21, 2003, Vonage, through its counsel, replied to the Department's letter. Vonage stated that it was a provider of "information services," not "telecommunications services," and therefore was exempt from any requirements on telecommunications providers in the state. The company explained that it offered service using Voice Over Internet Protocol, or VOIP. Vonage further replied that while it planned to develop an "Internet-based" 911 service in the future, it was not bound by state requirements concerning 911. (Exhibit 4).
- 9. In January 2003, the Department spoke with a Minnesota Vonage customer, who listed the telephone number Vonage provided him. The telephone number in question, according to the North American Numbering Plan Administrator's (NANPA) records, had been assigned to Focal Communications Corporation. In response to Information Requests issued by the Department, [TRADE SECRET DATA HAS BEEN EXCISED] The Federal Communications Commission only allows certificated telecommunications carriers, who present proof of their certification, to receive telephone numbers from NANPA. See 47 C.F.R. § 52.15(g)(2).
- 10. A presentation made by Vonage to the North American Numbering Council (NANC) in January 2003 explains the call flow when a phone call is made from or to a Vonage customer. (See Exhibit 5) As illustrated in Exhibit 5, during a call between a Vonage customer and a non-Vonage customer, the call travels over the Public Switched Telephone Network (PSTN). The full presentation, as of July 3, 2003, is available at www.nanc-chair.org/docs/nowg/Jan03 Vonage Presentation.pdf.
- 11. In response to Department Information Requests (IR), Vonage explained that for a call made by a Vonage end user [TRADE SECRET DATA HAS BEEN EXCISED]

THE OFFERING OF A TELECOMMUNICATIONS SERVICE

12. The Federal Communications Commission ("FCC") outlined the following factors to examine in determining whether IP telephony is a telecommunications service: 1) the provider holds itself out as providing voice telephony service; 2) the service allows use of Customer Premises Equipment (CPE) similar to that CPE necessary to place an ordinary touchtone call over the public switched telephone network; 3) the service allows the customer to call

telephone numbers assigned in accordance with the North American Numbering Plan (NANP); 4) the service transmits customer information without net change in form or content. See *In the Matter of Federal-State Joint Board on Universal Service, Report to Congress*, 13 FCC Rcd 11501 (1998) ("Report to Congress")

- 13. In stating that it was exempt from state certification and 911 requirements, Vonage claimed that its IP telephony service was an information service under 47 U.S.C. § 153(20). That statute states: "The term 'information service' means the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications..."
- 14. In its Report to Congress, the FCC discounted the argument that voice communications using IP telephony, of the type utilized by Vonage, fell under the definition of information services:

Specifically, when an IP telephony provider deploys a gateway within the network to enable phone-to-phone service, it creates a virtual transmission path between points on the public switched telephone network over a packet-switched IP network.

*** From a functional standpoint, the users of these services obtain only voice transmission, rather than information services such as access to stored files. The provider does not offer a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information. Thus, the record currently before us suggests that this type of IP telephony lacks the characteristics that would render them 'information services' under the statute, and instead bear the characteristics of telecommunications services.

Report to Congress, ¶89.

- 15. In its current representations to customers, Vonage markets its Digital Voice service as a telecommunications service. At www.vonage.com/learn_tour.php, it characterizes its service as a "phone service." (Exhibit 1)
- 16. A review of the Vonage website finds no mention of the Vonage Digital Voice service as an "information service," nor any mention that its service is not in compliance with state 911 or consumer protection-related requirements. In fact, Vonage represents that its service "is like the home phone service that you have today—only better!" and "replaces your current phone company." See www.vonage.com/learn_tour.php. (Exhibit 1)
- 17. At http://www.vonage.com/corporate/releases/pr 06 10 03.php, Vonage characterizes itself as "the fastest growing telephony company in the US, Vonage's service area encompasses more than 1,000 active rate centers in 77 US markets." The webpage also states that Vonage currently has over 25,000 lines in service. (Exhibit 6)

- 18. At www.nanc-chair.org/docs/nowg/Jan03 Vonage Presentation.pdf, (Exhibit 5) Vonage states that its service works with any touch-tone telephone. A touch-tone telephone is considered standard CPE for telephone service.
- 19. Vonage's service allows its end users to call telephone numbers assigned in accordance with the NANP.
- 20. The FCC has stated that phone-to-phone IP telephony transmits customer information without a net change in form or content. See Report to Congress, fn 188.
- 21. Since the 1998 Report to Congress, the FCC has reiterated that the underlying technology used to deliver a service is not the determining factor when deciding whether to categorize a service as a telecommunications service:

We believe the statute and our precedent suggest a functional approach, focusing on the nature of the service provided to customers, rather than one that focuses on the technical attributes of the underlying architecture.

CC Docket Nos. 02-33, 95-20, 98-10, rel. February 15, 2002, para. 7.

- 22. Based upon the multiple representations made on Vonage's website, information provided by Vonage regarding its Digital Voice Service, information provided by current Vonage end users regarding Vonage's Digital Voice Service, Vonage's use of standard CPE to provide telephone service, the ability of Vonage users to call telephone numbers assigned in accordance with the NANP, and the transmission of information without a net change in form or content, Vonage's Digital Voice Service offers real-time, two-way wireline voice communications comparable to local and long distance telecommunications service offered by certificated carriers; Vonage provides and/or offers to provide telephone services in Minnesota.
- 23. Vonage continues to provide and/or offer telephone services in Minnesota without proper certification.
- 24. The New York Public Service Commission, using the criteria identified by the FCC identified in its Report to Congress, has found that a long distance VOIP provider is in fact a telecommunications carrier. Order Requiring Payment of Intrastate Carrier Access Charges, Case 01-C-1119 (May 31, 2002). The Washington Utilities and Transportation Commission and the Ohio Public Utilities Commission have also opened dockets to address VOIP. See Docket Nos. UT-030694 and 03-950-TP-COI, respectively.

FAILURE TO PROVIDE ADEQUATE 911 SERVICES

25. As of the date of the Complaint, Vonage's website currently states at www.vonage.com/features_911.php, "Vonage is proud to offer 911 emergency dialing."

However, the website further states that 911 service will not work during a power outage and requires the customer to activate 911 dialing before calls to 911 will work. (Exhibit 7)

- 26. Vonage has never submitted a 911 plan to the Minnesota Metropolitan 911 Board, the Minnesota Department of Administration, the Department, or the Commission, to determine whether Vonage's advertised 911 service complies with applicable state 911 requirements, including, but not limited to, Minnesota Rules Chapter 1215 (Emergency 911 Systems). (Exhibit 8, Affidavit of Nancy Pollock, Metropolitan 911 Board, page 3; Exhibit 9, Affidavit of Jim Beutelspacher, Minnesota Department of Administration, page 4.)
- 27. Vonage's website further states that 911 calls will be routed to a different phone number than traditional 911 calls answered at Public Safety Answering Points (PSAP), but is not specific on where exactly where emergency calls will be routed. See http://www.vonage.com/features_911.php. (Exhibit 7)
- 28. Minnesota 911 standards prohibit the routing of emergency calls by alternate means other than the native 911 network, except in very limited circumstances and only with the permission of the 911 Board and other public safety agencies. Exhibit 8. Vonage has never consulted with the 911 Board, Administration, the Department, or the Commission to determine whether Minnesota 911 requirements allow calls to be routed to the numbers determined by Vonage. (Exhibit 8, page 4; Exhibit 9, page 5)
- 29. To the best of the Department's knowledge, Vonage has never consulted with the Minnesota PSAP locations to determine whether the PSAPs agree to the routing of 911 calls to these locations, nor to determine whether Vonage's call routing poses a public safety risk. Any arrangements Vonage made to route 911 calls to administrative numbers at Minnesota PSAPs were done without the prior consent and knowledge of the 911 Board, Administration, Department, and Commission. (Exhibit 8, page 4)
- 30. Administrative PSAP numbers of the type Vonage is routing 911 calls to are not equipped to answer 911 emergency calls. (Exhibit 8, page 4; Exhibit 9, page 5) Administrative PSAP numbers do not have the ability to receive ANI/ALI information, which automatically displays the number the caller is calling from, as well as the address which they are calling from, in the event that the caller is unable to speak. (Exhibit 8, pages 4-5) In addition, since administrative numbers are not equipped to handle emergency calls, they are not answered on a priority basis, may not be staffed 24 hours a day, and/or the recipient of the call may not be equipped or trained to summon emergency services to the caller. Id.
- 31. The Department has contacted certificated telecommunications carriers offering VOIP to inquire whether those carriers have been able to comply with state 911 requirements. Those carriers have indicated that they have provided 911 service in compliance with 911 requirements. The 911 plans of the carriers contacted have been reviewed by the 911 Board and approved by the Commission.

32. Vonage has also not deposited any 911 fees to the State of Minnesota. 911 fees are required to be collected from customers and fowarded to the State of Minnesota to fund the statewide 911 systems. (Exhibit 9, page 4.)

TARIFFS AND VIOLATION OF OTHER STATUTES/RULES

- 33. Vonage has not filed any tariffs with the Commission or the Department listing the pricing or terms and conditions for its telephone service provided in Minnesota.
- 34. At http://www.vonage.com/features_terms_service.php, Vonage lists terms and conditions of service that would be disallowed of a certificated telecommunications carrier. For example, Vonage "reserves the right to terminate Service at Vonage's discretion," may discontinue the service for "any reason" and may terminate a customer's account "at any time." The company also requires its end users to pay "all charges posted to [his/her] account, including "disputed amounts," by the date shown on the invoice. Vonage also disclaims responsibility for any lack of privacy which the customer experiences with regard to using the service. (Exhibit 10) These terms and conditions do not comply with various Commission Rules, including Minnesota Rules parts 7810.1800, 7810.1900, 7810.2000, 7810.2100, 7810.2400, and 7810.2500.

INFORMAL EFFORTS AT RESOLUTION

35. The Department has attempted to resolve the certification concerns with Vonage informally, beginning with its December 23, 2002 letter to Vonage. Vonage has declined efforts to resolve this matter informally, by refusing to comply with state certification requirements. Administration and the 911 Board have attempted to resolve violations of 911 standards informally, which Vonage has also refused to comply with. Vonage additionally has implemented a 911 "plan," advertised on its website, which it has implemented without first contacting any regulatory agency to determine whether its actions pose a risk to public health and safety. While Vonage initially complied with Department IRs, Vonage has now refused to produce information requested in Department IRs, eliminating the possibility of the Department, Administration, and 911 Board to gather additional information in an attempt to reach a workable solution to Vonage's service offering.

COUNT I: FAILURE TO OBTAIN CERTIFICATE OF AUTHORITY

36. Minnesota Statutes § 237.16, subd. 1(b) states that:

"No person shall provide telephone service in Minnesota without first obtaining a determination that the person possesses the technical, managerial, and financial resources to provide the proposed telephone services and a certificate of authority from the commission under terms and conditions the commission finds to be consistent with fair and reasonable competition, universal service, the provision of affordable telephone service at a quality consistent with commission rules, and the commission's rules."

37. Minnesota Statutes § 237.74, subd. 12 states in part:

Certification requirement. No telecommunications carrier shall construct or operate any line, plant, or system, or any extension of it, or acquire ownership or control of it, either directly or indirectly, without first obtaining from the commission a determination that the present or future public convenience and necessity require or will require the construction, operation, or acquisition, and a new certificate of territorial authority.

38. Minnesota Rules 7812.0200, subp. 1 provides:

"No person may provide telecommunications service in areas served by local exchange carriers with 50,000 or more subscribers in Minnesota without first obtaining a certificate under this part and parts 7812.0300 to 7812.0600..."

- 39. Vonage has not obtained a certificate of authority from the Commission. Vonage is providing telecommunications service in areas served by local exchange carriers with 50,000 or more subscribers in Minnesota, but it has not first obtained a certificate under Minn. Rule 7812.0200, subp. 1, or under parts 7812.0300 to 7812.0600. Respondent Vonage has been operating in Minnesota without authority since December 16, 2002, and is currently providing local exchange service to at least 100 customers.
- 40. The Commission has previously granted certificates of authority based upon the nature of the service being provided to customers, rather than the technology of the underlying facilities used to provide that service, in accordance with the FCC's approach. For example, in Docket No. P5981/NA-00-1530, Order Issued January 17, 2001, the Commission granted a certificate of authority to a carrier who indicated it provides telephone service through its cable facilities.
- 41. Vonage has violated Minnesota Statute § 237.16, subd. 1(b), Minnesota Statute § 237.74, subd. 12 and Minnesota Rule 7812.0200, subp. 1.

COUNT II: FAILURE TO COMPLY WITH 911 REQUIREMENTS

42. Minnesota Rules part 7812.0550 subpt 1 states in part:

"Before providing local service in a service area, a competitive local exchange carrier (CLEC) shall submit to the commission a comprehensive plan, detailing how it will provide 911 service to its customers in a manner consistent with applicable law, including

chapter 1215, and comparable to the provision of 911 service by the local exchange carrier (LEC) operating in the competitive local exchange carrier's service area....The commission shall not permit the CLEC to begin providing local service until the commission has approved the plan."

- 43. Although required to do so, Vonage has not submitted a comprehensive plan to the Commission detailing how it will provide 911 service to its customers in a manner consistent with applicable law.
 - 44. Vonage has violated Minnesota Rules part 7812.0550 subpt. 1.

COUNT III: FAILURE TO PAY 911 FEES

Minnesota Statutes § 237.49 states in part:

Each local telephone company shall collect from each subscriber an amount per telephone access line representing the total of the surcharges required under sections 237.52, 237.70, and 403.11. Amounts collected must be remitted to the department of administration in the manner prescribed in section 403.11.

- 45. Vonage has not remitted any 911 fees to the Department of Administration.
 - 46. Vonage has violated Minnesota Statutes § 237.49.

COUNT IV: FAILURE TO FILE TARIFF

47. Minnesota Statutes § 237.07 states in part:

Every telephone company shall elect and keep on file with the department a specific rate, toll, or charge for every kind of noncompetitive service and a price list for every kind of service subject to emerging competition, together with all rules and classification used by it in the conduct of the telephone business...

- 48. Although required to do so, Vonage has not kept on file with the Department any Commission-approved specific rate, toll, charge or price list for any service, nor any rules or classifications used by it in the conduct of the telephone business.
 - 49. Vonage has violated Minnesota Statutes § 237.07.

REQUEST FOR TEMPORARY RELIEF

- 50. Minn. Stat. § 237.462, subd. 7 provides for temporary relief pending a resolution of a dispute. Temporary relief is appropriate, after notice and an opportunity for comment, if the Commission finds that a verified factual showing has been made that the party seeking relief will likely succeed on the merits, the order is necessary to protect the public's interest in fair and reasonable competition, and the relief sought is technically feasible.
- 51. Based on the facts as pleaded, the Department is likely to succeed on the merits. Vonage is required to comply with the Minnesota Statutes and Rules referenced above in Count 1 and Count 2. Vonage simply has not complied despite informal efforts at resolution. As listed above, the Department initially contacted Vonage in December 2002 regarding certification and 911 compliance. Vonage implemented a "911 plan" without consulting with or contacting the Department, 911 Board, or any other state regulatory agencies before implementing its purported 911 Plan, in a manner that poses a threat to the public safety of Minnesotans. While Vonage has responded to a number of IRs issued by the Department, Vonage has also stated that it is not required to respond to Department IRs, and has refused to respond to some IRs, including the Department's request to provide a copy of its agreement with its Gateway provider.
- 52. An order for temporary relief is necessary to protect the public's interest. Despite clear legal obligations to obtain a certificate of authority, to file and obtain approval from the Commission for a 911 plan, Vonage has taken none of these steps to comply with Minnesota law.
- 53. Without immediate relief, it is reasonable to assume that Vonage will continue to provide unauthorized service and will continue to represent that its service is a replacement to traditional telephone service. Consumers of Vonage are at risk in the event of an emergency since a 911 plan has never been approved.
- 54. The temporary relief sought herein, like the permanent relief requested, is technically feasible.
- 55. Accordingly, under Minn. Stat. § 237.462, subd. 7, the Department hereby requests that the Commission issue an order:
- 56. Prohibiting Vonage from pursuing marketing efforts on all potential Vonage customers until Vonage has applied for and received proper certification from the Commission. Further, that Vonage be required to immediately provide a copy of its contract with its Gateway provider;
- 57. Requiring Vonage to mail to its current Minnesota customers, a Commission-approved notice explaining that Vonage is not a certificated telephone company in the state of Minnesota and that Vonage's 911 service does not comply with state requirements. A proposed notice to Vonage end users is attached as Exhibit 11; and

58. Requiring Vonage, within 5 days of the date of the Commission's hearing in this docket, to contact the 911 Board and Department of Administration to submit a 911 plan for both agencies' review.

REQUEST FOR AN EXPEDITED PROCEEDING

59. The Department requests an expedited proceeding pursuant to Minn. Stat. § 237.462, subd. 6. An expedited proceeding is in the public interest. Vonage is currently operating without certification, in violation of 911 rules, and without proper tariffs. The safety concerns associated with the 911 issue alone underscores the need to resolve this matter promptly.

OTHER RELIEF REQUESTED

WHEREFORE, the Department further requests that the Commission:

- 60. Issue an Order finding that Vonage has knowingly and intentionally violated cited Minnesota Rules and Statutes;
- 61. Order Vonage to fully comply with all Minnesota Statutes and Rules relating to the offering of telephone service in Minnesota within 30 days of the Commission's Order;
- 62. Order Vonage to remit 911 fees to the Minnesota Department of Administration for the period of time when it served Minnesota customers but did not pay such fees;
 - 63. Assess penalties it deems appropriate under Minn. Stat. § 237.461 or .462.
- 64. Grant such other and further relief as the Commission may deem just and reasonable.

Dated:

Respectfully submitted,

STEVEN H. ALPERT Assistant Attorney General Atty. Reg. No. 1351

525 Park Street, Suite 200 St. Paul, Minnesota 55103 (651) 296-3258 (Voice)

ATTORNEY FOR MINNESOTA DEPARTMENT OF COMMERCE

STATE OF MINNESOTA)
) ss
COUNTY OF RAMSEY)

AFFIDAVIT OF SERVICE

I, Jan Mottaz, on the 14th day of July, 2003, served the attached MN Department of Commerce Complaint against Vonage Holdings Corporation.

DOCKET NUMBER: P6214/C-03-108

by depositing in the United States Mail at the City of St. Paul,
A true and correct copy thereof, properly enveloped with postage prepaid
by personal service (MN PUC)
by delivery service
by express mail-UPS overnite
by e-mail or fax

To all persons at the address indicated below:

Russell Blau Swidler Berlin Shereff Friedman LLP 3000 K St NW, ste 300 Washington DC 20007-5116

John Rego Vonage Holding Corp 2147 Route 27 Edison NJ 08817

XX

Jan Mart

Exhibit 3

Response of Vonage Holdings Corporation to Request for Temporary Relief, Docket No. P6214/C-03-108 (filed Jul. 22, 2003)

Before the MINNESOTA PUBLIC UTILITIES COMMISSION

In the Matter of the Complaint of the)	
Minnesota Department of Commerce)	
Against Vonage Holding Corp)	
)	Docket No. P6214/C-03-108
Regarding Lack of Authority to Operate)	
in Minnesota)	

RESPONSE OF VONAGI: HOLDINGS CORPORATION TO REQUEST FOI: TEMPORARY RELIEF

Vonage Holdings Corporation ("Vonage"), by and through its undersigned counsel, hereby responds to the request for temporary relief contained in the Complaint of the Minnesota Department of Commerce ("DOC") in the above-captioned proceeding, pursuant to Minn. Stats. § 237.462, subd. 7(e). Vonage reserves the right to respond more completely to the allegations of the Complaint when it files its Answer.

Vonage opposes the DOC's request for temporary relief. Temporary relief is not justified by the statutory criteria, and would not be in the public interest. Further, the DOC's allegations of a threat to public safety are exaggerated and misleading, and, while important, not directly relevant to the statutory criteria for granting temporary relief. Nor do the DOC's allegations amount to exigent circumstances justifying a waiver of the ten-day notice period required by Minn. R. 7829.2800.

Introduction and Summary

The DOC's Complaint alleges that V mage is offering "telephone service" in Minnesota without being authorized by the Commission under Minn. Stat. § 237.16, subd. 1(b); and that Vonage has not complied with various requirements of the statutes and the Commission's rules applicable to telephone companies. The DOC seeks four forms of temporary relief: (1) prohib-

¹ Vonage's counsel received a telephone call from the Commission on July 18, 2003, only four business days prior to the Commission's consideration of the DOC's request for temporary relief. Moreover, the written notice was not issued until July 22, 2003, only two business days prior to the Commission's hearing. Vonage objects to this shortened notice period and reserves its right to contest any Commission decision on the basis that Vonage's due process rights were violated.

iting Vonage from "pursuing marketing efforts on all potential Vonage customers" until Vonage receives certification (Complaint, para. 56); (2) requiring Vonage to "immediately provide a copy of its contract with its Gateway provider" (Complaint, para. 56); (3) requiring Vonage to mail a notice to its current Minnesota customers stating that it is not a certificated telephone company (Complaint, para. 57); and (4) requiring Vonage, "within 5 days of the date of the Commission's hearing in this docket," to submit a 911 plan for approval (Complaint, para. 58).²

As shown herein, Vonage's service is not a "telephone service" and Vonage is not a "telephone company." Rather, Vonage is providing an Internet application that performs a net protocol conversion and permits voice communications between the Internet and the telephone network. Because neither Vonage's service, nor Vonage itself, is subject to the Commission's jurisdiction, the DOC is unlikely to prevail on the merits of its Complaint and the Commission should deny the DOC's request for temporary relief.

Further, even if the Commission harbors any doubt about the correct regulatory classification of Vonage's service, the Commission should deny the DOC's request for temporary relief because the DOC has not shown that its requested relief is in the public interest.³ The DOC's allegations that the public interest requires immediate relief are overblown, misleading, and inaccurate. First, the fact that the DOC has been investigating Vonage for over six months shows that there is no immediate need for relief. If the Commission grants the DOC's request for an expedited hearing, and if the DOC succeeds on the merits, the Commission could order the requested relief within two months — one third of the time that the DOC has already been investigating Vonage.

Apparently the DOC wants the Commission to issue a temporary relief order now that will not become effective until some undetermined future date. The purpose of this request is unknown. However, if the DOC believes that the submission of a 911 plan can wait until after a hearing, why can it not wait until after a decision on the merits?

Nor are the DOC's requests for temporary relief "necessary." For example, if the Commission determines it has jurisdiction and refers the DOC's Complaint for either a contested case or expedited proceeding, the DOC may use the discovery process to seek production of Vonage's agreement with its "gateway provider." The DOC has not shown why bypassing this process is necessary.

Second, it is inconceivable that Vonage's continued provision of service for an additional two months to approximately 426 customers in Minnesota — without the overbroad, prejudicial and unconstitutional restrictions on marketing and customer notice requested by the DOC — would have any meaningful impact on competition in Minnesota. To the contrary, granting DOC's requested relief would deprive Minnesota consumers of the ability to access an exciting, innovative new Internet service.

Third, the DOC's repeated insinuations that Vonage is creating a risk to public safety by employing improper 911 procedures are both false and misleading. Vonage's interim 911 solution is already used by other entities in Minnesota and Vonage has advised its customers of the limitations of its 911 service. Ironically, because telephone companies may not provide 911 service until their 911 plans are approved, granting the DOC's requested 911 relief would leave Vonage customers with *less* access to emergency services than they have now, pending the outcome of this proceeding. Public safety is important and Vonage is willing to work with the DOC to address 911 concerns. However, the particular statutory criteria the DOC must meet to receive temporary relief is to show that the relief protects the public interest in competition, not the public interest in safety.

Finally, it is not clear that the DOC's requests for temporary relief are within this Commission's jurisdiction or technically feasible. First, the Commission does not have jurisdiction to order Vonage to cease marketing its services to customers nationwide, as the DOC appears to request. Second, because Vonage markets its service nationally and over the Internet, Vonage does not target any marketing specifically to Minnesota consumers so any restrictions on Vonage's marketing would necessarily impact Vonage nationwide. Third, because Vonage's customers may purchase Vonage's service over the Internet, at retail stores, or through websites such as Amazon, and connect to Vonage's service over the Internet, Vonage does not know where a customer is located at any given time. In sum, it may not be technically feasible to limit Vonage's marketing to Minnesota consumers or to mail a notice to Vonage's customers that use its service in Minnesota.

Because the DOC is not likely to succeed on the merits of its Complaint and the requested relief is not in the public interest and may not be technically feasible, the Commission should deny the DOC's request for temporary relief.

Vonage DigitalVoice™

Vonage DigitalVoiceTM service is an innovative offering that Vonage markets as an "alternative to traditional telephone service." Although it resembles telephone service in many respects, it also has crucial technical and functional differences. Vonage's service allows its customers to send and receive asynchronous digital IP data packets over the Internet, and provides conversion services to allow these packetized communications to interface with the analog and synchronous digital protocols of the Public Switched Telephone Network ("PSTN"). To access this service, customers must have a high-speed Internet connection, such as a DSL or cable modem service. Vonage does not provide these Internet connections. The customers can attach customer premises equipment ("CPE'), such as a router (in certain configurations) and a Cisco Multimedia Terminal Adapter ("MTA") (i.e., a computer), to their Internet connection. Although the customer may purchase the MTA from Vonage, it is also available from other retail outlets and on the Internet. Once the custom or has installed the appropriate CPE and configured the requisite software, the customer can place and receive calls by establishing a connection over the Internet to Vonage's server.

Vonage's network consists of media gateways that provide an interface between the Internet and the PSTN (including net protocol conversion between the incompatible digital formats used by these two networks), and computer servers that process voice stream data set-up signaling and route packetized data between the media gateways and other points on the Internet. Vonage does not provide either Internet access or telecommunications services. Vonage pur-

See "About Vonage" in Exhibits 1 and 6 to the DOC's Complaint. Although the DOC attaches these examples of Vonage materials that distinguish DigitalVoice as an "alternative to traditional telephone service," the DOC stubbornly ignores Vonage's own description of its service and instead repeatedly claims that Vonage represents itself as a tracitional telephone provider.

chases both Internet access and telecommunications services from other parties so that it can communicate with its customers over both networks.

Legal Standard for Temporary Relief

Minn. Stats. § 237.462, subd. 7(c), establishes the legal standard for temporary relief, as follows:

- (c) After notice and an opportunity for comment, the commission may grant an order for temporary relief under this subdivision upon a verified factual showing that:
- (1) the party seeking relief will likely succeed on the merits;
- (2) the order is necessary to protect the public's interest in fair and reasonable competition; and
- (3) the relief sought is technically feasible.

An order for temporary relief must include a finding that the requirements of this subdivisior have been fulfilled.

Under the plain terms of the statute, temporary relief can be granted only if *all three* of the specified criteria have been fulfilled. In this case, none of the three criteria is satisfied, as explained below. Thus, the DOC's request for temporary relief should be denied.

The Department Is Not Likely to Succeed on the Merits

As an initial matter, Vonage submits that the issue of whether the Commission can regulate services provided over the Internet is a novel legal question that has never before been addressed by this agency or the Minnesota courts. Further, because the potential pre-emptive effect of Federal law is unclear in this context, the Commission may determine that it does not even have jurisdiction to hear the DOC's Complaint. These questions deserve full and thoughtful consideration by the Commission, and should not be prejudged hastily in the context of a request for temporary relief. The Commission should not find the DOC is "likely to succeed" on the merits where its complaint hinges on a substantial, unresolved question of law.

If the Commission does consider the merits of DOC's Complaint, however, it should find that DOC is not likely to succeed because Vonage is not, in fact, providing telephone service.

Vonage's service is not a "telephone service" within the statutory meaning of that term. Vonage does not provide its customers with facilities for communication; rather, the customers must obtain access services independently from an ISP. Although Vonage's service uses communications facilities, a key function of DigitalVoice is to convert the format of the customer's transmission to connect incompatible network protocols. This type of net protocol conversion is the hallmark of an information service, not a communications service, and is not within the scope of the Commission's regulatory jurisdiction.

As noted earlier, Minn. Stat. § 237.16 requires Commission authorization before a person may "provide telephone service in Minnesota[.]" The term "telephone service," however, is not defined by statute. Section 237.01 defines "telecommunications carrier" and "telephone company," but both of those definitions also contain and depend on the undefined term "telephone service." Therefore, the Commission must rely on the Minnesota courts' interpretation of the term, as well as the federal definitions which may supplant the term.

The Minnesota Supreme Court has considered the meaning of "telephone service" in Minnesota Microwave, Inc. v. Public Service Commission, 291 Minn. 241, 190 N.W.2d 661 (1971). It stated that, in the absence of a statutory definition, it would interpret the statutory language as a matter of law, based upon the operative facts found by the Commission. 190 N.W.2d at 664. In that case, the Court held that the statutory definition did not encompass a provider of one-way closed circuit microw we systems for transmitting educational television signals. It stated, among other things, that "[i]t appears that for the most part the term 'telephone service' refers to the supplying of facilities for two-way communication." 190 N.W.2d at 665. However, it also considered the Federal Communications Commission's decisions concerning the meaning of "telephone exchange service" and the legislative purpose of the statutes regulating telephone services. 190 N.W.2d at 666-67. Subsequent decisions by this Commission confirm that the mere existence of a two-way communication is not enough to classify a service as "telephone service," since the Commission decided that the provision of conference calling (which obviously requires two-way communication) is not within that definition. Petition of A

Business Conference Call, Inc., Docket No. P-488/TC-97-1814, 1998 WL 1754268 (Minn. PUC). Rather, all aspects of a particular service must be considered in determining whether it falls within the ambit of the legislative phrase "telephone service." The Commission cannot make the necessary findings of facts to determine whether it has statutory jurisdiction until after Vonage answers the Complaint and both parties have an opportunity to submit evidence; and it cannot rationally determine that the DOC is "likely to succeed" in the absence of such facts.

Further, this Commission has previously relied upon FCC precedent for guidance in interpreting the scope of its regulatory jurisdiction.⁵ In this case, the FCC has determined that services like Vonage's are not "communications" and therefore are not subject to regulation under Federal law. Vonage's service is an "information service" pursuant to 47 U.S.C. § 153(20). Federal law defines "telecommunications service" as "the offering of telecommunications for a fee directly to the public or to such classes of users as to be effectively available directly to the public regardless of the facilities used." 47 U.S.C. § 153(46). The term "telecommunications" is defined as "transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." 47 U.S.C. § 153(43). The definition of "telecommunications" and "telecommunications service" can be contrasted with "information service," which is defined by the 1996 Act as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does no: include any use of any such capability for the

⁵ See, e.g., AT&T Communications of the Midwest, Inc. v. US West Communications Inc., Order, Docket Nos. P-421/C-99-1183 (Minn. P.U.C. Aug. 15, 2000) (recognizing that the MPUC must consider the jurisdiction of the Federal Communications Commission in certain instances); Petition of US West Communications, Inc. for a Determination that ISP Traffic Is Not Subject to Reciprocal Compensation Payments Under the MFS/US West Interconnection Agreement, Order Denying Petition, Docket Nos. P-3167, 421/CP-99-529 (Minn. P.U.C. Aug. 17, 1999) (considering the Federal Communications Communication's Declaratory Ruling in its intercarrier compensation for ISP-Bound traffic proceeding in determining the appropriate compensation for such traffic); Bridge Water Tel. Co., Order, Docket Nos. P-427, 3075, 3081, 421/C-92-9 (Minn. P.U.C. May 11, 1993) (analyzing extent of Federal Communications Commission jurisdiction over certain services).

management, control, or operation of a telecommunications system or the management of a telecommunications service." 47 U.S.C. § 153(20).

The FCC has determined that these statutory definitions are mutually exclusive and parallel the definitions of "basic service" and "enhanced service" developed in the FCC's Computer II proceeding. In this fashion, Congress intended to maintain a regime in which information service providers are not subject to regulation as common carriers merely because they provide their service "via telecommunications." Contrary to the DOC's allegations, Vonage's service satisfies the FCC's definition of an enhanced service and the FCC has never classified services like Vonage's as "telecommunications."

In the Second Computer Inquiry, the FCC defined unregulated "enhanced services" as "services, offered over common carrier transmission facilities used in interstate communications, which [1] employ computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information; [2] provide the subscriber additional, different or restructured information; or [3] involve subscriber interaction with stored information." Vonage's service changes the form of the information as sent and received by the user, by converting the asynchronous IP packets generated by the MTA into the synchronous TDMA format used by the public switched telephone network (and vice versa). As such, Vonage's provision of VoIP service "employ[s] computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information." While an enhanced service must only meet one of the criteria set out above, Vonage's service also "provide[s] the subscriber additional, different or restructured information."

⁶ Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), Docket No. 20828, Final Decision, 77 FCC 2d 384 (1980) ("Computer II"), subsequent history omitted.

⁷ 47 C.F.R. § 64.702(a).

⁸ 47 C.F.R. § 64.702(a).

⁹ Id.

While the functionality that Vonage provides is similar to that provided by traditional telephone companies, the manner in which Vonage provides its VoIP service is significantly different. In *Computer II*, the FCC recognized that communications and enhanced services could be similar.

We acknowledge, of course, the existence of a communications component. And we recognize that some enhanced services may do some of the same things that regulated communications services did in the past. On the other side, however, is the substantial data processing component in all these services. 10

The FCC concluded that the technological differences between the services justified different regulatory treatment.¹¹

Vonage's service performs a form of data processing that perhaps was not foreseen in 1980, but is now feasible due to advances in technology: it processes voice communications into digital data and routes them over data networks, allowing users to place and receive telephone calls without a telephone line, through their broadband Internet connection. Nonetheless, the FCC did foresee the fact that the boundary between traditional communications and data processing would be blurry, and the mere fact that two services "do some of the same things" does not mean they should be regulated similarly. Rather, Computer II makes clear that it is essential to examine the actual functionality of the Vonage service to determine the appropriate level of regulation.

Vonage's provision of VoIP services does not originate and terminate calls in a format that is compatible with the traditional, circuit-switched telephone network. As noted above, a service may be classified as enhanced if it alters either the content or the format of the customer's transmissions. Vonage does not modify the content of its customers' transmissions, but

¹⁰ Computer II at 435 (emphasis added).

¹¹ The FCC found that it had "ancillary jurisdiction" to regulate enhanced services under Title I of the 1934 Act for the purpose of "assuring a Nation-wide wire and radio communications service with adequate facilities at reasonable charges." However, the FCC declined to exercise this jurisdiction, finding that common carrier regulation of enhanced services is unwarranted. Id.

it does convert these transmissions to provide an interface between otherwise incompatible network protocols. The FCC has specifically held that such protocol conversion services are enhanced, as long as they perform a *net* protocol conversion.¹² The net conversion test examines the service on an end-to-end basis from the demarcation point at the premises of the originating caller to the demarcation point where the call will be terminated.¹³

Vonage's VoIP service satisfies the FCC's net protocol conversion test and therefore is not originating and terminating its service in the same format. As set out above, the net conversion test examines the service on an end-to-end basis from the demarcation point at the premises of the originating caller to the demarcation point where the call will be terminated. Vonage's service requires the installation of the MTA on the customer's premises. As a result, when a Vonage customer originates a telephone call, the MTA allows Vonage customers to convert analog voice signals into digital IP data packets that travel over the Internet in an asynchronous mode. Vonage subscribers can also use the MTA to convert digital IP packets that travel over the Internet into analog voice signals when receiving calls. When originating phone calls,

Services that result in no net protocol conversion to the end user continue to be classified as basic services. Communications Protocols under Section 64.702 of the Commission's Rules and Regulations, Memorandum Opinion, Order, and Statement of Principles, 95 FCC 2d 584, 596 (1983) ("Communications Protocols Decision"). The FCC later summarized this conclusion to stand for the principle that the protocol conversion standard of 64.702(a) does not reach network processing in carrier's networks (setup, takedown and routing of calls or their sub-elements). Waiver of Section 64.702 of the Commission's Rules, Memorandum Opinion and Order, 100 FCC 2d 1057, 1071 (1985).

In its Third Computer Inquiry, the FCC restated three exceptions to the rule that protocol processing renders a service enhanced. First, the FCC limited the enhanced services definition to end-to-end communications between or among subscribers. In other words, communications between a subscriber and the network are not enhanced services. Second, protocol conversion required by the introduction of new technology does not qualify as an enhanced service. Thus where innovative "basic" network technology is introduced slowly to the network and conversion equipment is used to maintain compatibility with CPE, the protocol conversion does not render the service enhanced. Third, conversions taking place solely within the network facilitate basic service and are not enhanced. Amendment of Sections 64.702 of the Commission's Rules and Regulations (Computer III), Phase II, CC Docket No. 85-229, Report and Order, 2 FCC Rcd 3072, 3081-3082 (1987).

¹³ FCC rules define the demarcation point as the point of demarcation and/or interconnection between the communications facilities of a provider of wireline telecommunications, and terminal equipment, protective apparatus or wiring at a subscriber's premises. 47 C.F.R. § 68.3. At least for purposes of the FCC's access charge rules, a call "terminates" at the demarcation point. 47 C.F.R. § 69.2(cc).

Vonage customers are transforming analog signals into IP data packets and routing the packets over the Internet's packet switched network. Similarly, when a call terminates at the Vonage Point of Presence, the call is carried by the customers of the ISP in data format and is converted from an IP data packet to an analog voice signal at the CPE. The ultimate digital-to-analog conversion is not performed within the Vonage network, but on the Vonage's customer's premises by CPE, both when originating and receiving a telephone call. Thus, Vonage's service performs a net protocol conversion as defined by the FCC.

In sum, contrary to the DOC's allegations, ¹⁴ DigitalVoice does not meet two of the four tentative criteria the FCC identified for phone-to-phone IP telephony that "bears the characteristics of" telecommunications services. First, because a Vonage customer must use CPE different from the CPE used to place an ordinary touch-tone call, specifically the MTA, Vonage's service does not meet the second tentative criterion the FCC set forth for phone-to-phone IP telephony. ¹⁵ Second, as explained above, because Vonage's service performs a net protocol conversion end-to-end, it does not meet the fourth tentative FCC criterion. ¹⁶ Moreover, the FCC refused to declare categorically that every service that met its four criteria would necessarily be a telecommunications service, concluding that "[w]e do not believe ... that it is appropriate to make any definitive pronouncements in the absence of a more complete record focused on individual service offerings." Again, this FCC refusal to classify phone-to-phone IP telephony as a

¹⁴ DOC Complaint at ¶¶ 12-22.

¹⁵ See DOC Complaint at ¶ 12. Vonage notes that in paraphrasing the FCC criteria, the DOC misrepresented those criteria. The second prong of the FCC's four-part test does not rest on the similarity of CPE, but rather rests on the fact that the customer is not required "to use CPE different from that CPE necessary to place an ordinary touch-tone call." Federal-State Joint Board on Universal Service, Report to Congress, 13 FCC Rcd. 11501, ¶ 88 (1998) ("Report to Congress").

Again, by paraphrasing the *Report to Congress*, the DOC misrepresents footnote 188. That footnote states that "Routing and protocol conversion within the network does not change this conclusion, because from the user's standpoint there is no net change in form or content." (Emphasis added.) The FCC made no generic finding, as the DOC implies, that all phone-to-phone IP telephony transmits customer information without a net change in form.

¹⁷ Report to Congress at ¶ 90.

telecommunications service weighs against the Commission determining with respect to this novel question of law, that the DOC is likely to succeed on the merits.

Finally, the Commission should note that an unduly broad definition of "telephone service" would undoubtedly sweep into regulation entities that are far afield from the legislature's intent, as construed in *Minnesota Microwave*. Minnesota customers have available to them any number of services that transmit two-way communications (including voice communications) by means other than by "telephone," and these services are not regulated. For example, AOL's Instant Messenger service transmits two-way communications instantaneously in the form of text messages, and can also transmit voice messages over user-supplied hardware (the AIM Talk feature). Microsoft's XBOX LiveTM service allows customers to play video games against each other over the Internet, and, with a provided Communicator headset, also allows them to talk to each other while playing. These are just two of the most prominent service providers, but many other examples exist of voice communications services that are not transmitted by telephone. As the Court cautioned in *Minnesota Microwave*, the statute should not be interpreted so broadly as to regulate businesses that do not threaten "the usual monopolistic evils." 190 N.W.2d at 667.

For all these reasons, the Commission should find that the term "telephone service" does not encompass Vonage's service, and therefore that the DOC is not likely to prevail on the merits.¹⁸

Temporary Relief Is Not in the Public Interest

Contrary to the statutory requirement, the temporary relief sought by the DOC is not "necessary to protect the public's interest in fair and reasonable competition[.]" The DOC has failed to show how its requests meet these standards. To the contrary, the requested action would be contrary to the public's interest in competition, because it would deprive Minnesota customers of the ability to access an exciting, innovative new Internet service.

All of the DOC's specific allegations against Vonage are based on the premise that Vonage is offering telephone service, and therefore the DOC's likelihood of success on all claims depends on that threshold issue. Vonage will respond to these allegations in detail in its Answer.

1. The DOC's Actions Show that the Requested Relief Is Not Necessary

The claim that temporary relief is "necessary" is contradicted by the leisurely approach taken by the DOC itself in preparing its Complaint. As the DOC itself states, it began investigating Vonage in December 2002. It waited nearly seven (7) months before filing a Complaint alleging (in very vague terms) that dire consequences may ensue if Vonage is permitted to operate even for a few more weeks. In this case, the DOC's actions speak louder than its words. There is no pressing emergency requiring the Commission to act precipitously.

2. Granting the DOC's Relief Would Deprive Minnesota Consumers of Competitive Alternatives

The DOC's claim that "fair and reasonable competition" would be impaired without immediate temporary relief is preposterous. There are over three million telephone access lines in the state of Minnesota. Vonage believes that it has approximately 426 customers in Minnesota. John Rego Affidavit at ¶ 3. Even assuming arguendo that Vonage were somehow competing "unfairly" by operating without a certificate of authority, it is inconceivable that a few months of providing service to a handful of customers would have any material effect on telephone markets as a whole or on the public at large.

3. The Statute Protects the Public Interest in Competition, Not Safety

The DOC's repeated insinuations that Vonage is creating a risk to public safety by employing improper 911 procedures are false, misleading and irrelevant to the legal standard. In this respect, again, the DOC's leisurely attitude is revealing. When the DOC began its investigation of Vonage in 2002, the company promptly advised DOC that it was not (at that time) completing any 911 calls. The DOC evidently did not consider the absence of 911 service to constitute a public safety crisis, because it took no action. Since then, Vonage began providing an interim 911 dialing solution. Although the DOC claims that this solution is not adequate, it

¹⁹ See Leslie Brooks Suzukamo, "Race for local phone service heats up," Pioneer Press (June 12, 2003) (available at http://www.twincities.com/mld/pioneerpress/news/local/6076042.htm).

would seem obvious that completing even *some* 911 calls is better than completing none; yet the DOC did not act until after Vonage started completing 911 calls.

Moreover, because the DOC's concerns about 911 are based on a network configuration that other entities use in Minnesota, its request is actually against the public's interest in fair competition. It is Vonage's understanding that Telecommunications Relay Service ("TRS") calls, telematics calls, cellular calls, and possibly calls by other entities, are delivered to the Public Safety Answering Point ("PSAP") over administrative lines rather than dedicated 911 trunks.

Further, the DOC's concerns are based on a network configuration that Vonage is in the process of changing. Vonage is routing calls to PSAP administrative lines as an interim 911 solution. However, Vonage is working diligently with its 911 provider and other partners, who are in turn working with PSAPs, to deliver Vonage 911 calls over dedicated 911 trunks. Vonage and its partners are testing this new network configuration for the delivery of enhanced 911 calls during the week of July 21, 2003 and are willing to work with the DOC, the Department of Administration, and the Metropolitan 911 Board as Vonage transitions to its permanent E911 solution in Minnesota. John Rego Affidavit at ¶2, Exhibits 1-3.

Ironically, because telephone companies may not provide 911 service until their 911 plan is approved, granting the DOC's requested relief would actually result in *no* 911 service for Vonage customers while this proceeding is pending. The DOC has not explained why no 911 service promotes the public interest more than Vonage's interim 911 service does.

Finally, while Vonage agrees that safety is important, that aspect of the public interest is not included in the statutory criteria for granting temporary relief under Minn. Stats. § 237.462, subd. 7. Violations of laws or rules relating to public safety may be remedied under other statutory provisions, but the DOC fails to explain how promoting public safety promotes the public's interest in fair and reasonable competition.

For all these reasons, the DOC's request for temporary 911 relief does not satisfy the requirements of the statute.

4. Granting the Requested Relief Would Deny Vonage Important Statutory and Constitutional Rights

Most of the temporary relief requested by the DOC is improper for other reasons. The request for a copy of a contract is an improper attempt to use the temporary relief procedure to bypass the discovery process. If the DOC believes that a particular document is relevant to an issue in dispute in this proceeding, it has the right to submit a discovery request under the rules governing contested cases, or in the case of an expedited proceeding under Minn. Stat. § 237.462, subd. 6(j)(1). Ordering the production of a document, without affording Vonage an opportunity to object to the relevance of the request, is not a proper form of temporary relief. Further, the DOC has not explained how the production of this contract to the DOC would promote the public's "interest in fair and reasonable competition" in any way.

The requests for a notice to current customers and the filing of a 911 plan clearly seek to prejudice the outcome of this proceeding. If Vonage is required to announce to its current customers that it is not a certificated telephone company, that would plainly imply that the Commission believes the certification requirement is applicable. As the DOC no doubt intends, this notice would have a chilling effect on Vonage's customers and discourage them from continuing to use the company's service. Further, compelling Vonage to make statements contrary to its own legal position would have serious First Amendment implications. Similarly, requiring Vonage to file a 911 plan would amount to a finding that Vonage is subject to the statutory provisions requiring telephone companies to file these plans. Because Vonage would have to expend substantial resources to develop and file a plan before receiving a full hearing on its legal position, the DOC's request would impair Vonage's property rights without due process. Both of these requests, therefore, should be denied.

²⁰ See, e.g., Livestock Marketing Assoc. v. United States Dept, of Agriculture, No. 02-2769, 02-2832, 2003 WL 21523837 (8th Cir. July 8, 2003) (compelling beef producers to pay for advertising with which they disagree violates producer's First Amendment right to free speech).

²¹ See, e.g., Matthews v. Eldridge, 424 U.S. 319 (1976) (finding that a meaningful opportunity to be heard at a meaningful time and manner is required prior to impairing property rights); Fosselman v. Comm'r of Human

The Requested Relief is Not Technically Feasible in Some Instances

The DOC requests that the Commission order Vonage to cease marketing its services and to mail a notice to all Minnesota customers. Because these two requests are not technically feasible, the Commission should deny these DOC requests.

As an initial matter, the DOC does not limit its marketing request to marketing in Minnesota. The Commission clearly does not have jurisdiction to order Vonage to cease its marketing efforts nationwide.²² Moreover, Vonage markets its service through its website over the Internet and through national media. While Vonage may be able to add a disclaimer concerning service in Minnesota to its national marketing materials, Vonage cannot prevent all customers from using its service in Minnesota, which appears to be the DOC's goal. This is because Vonage's service is portable and not dependent on the customer's physical address. A Vonage customer may use DigitalVoice from any broadband Internet connection. A Vonage customer may also purchase Vonage's service over the Internet, at retail stores, or through websites such as Amazon. Thus, a resident of New York or Minnesota could purchase Vonage's service from a RadioShack in New York, travel to Minnesota and, using a broadband Internet connection, place calls from Minnesota. Similarly, because Vonage does not provision facilities to its customers, a Minnesota resident could give Vonage an out-of-state address when ordering service. There is no technically feasible way for Vonage to determine, with respect to any particular call, whether that call is originating from a customer that is physically located in Minnesota. John Rego Affidavit at ¶ 4.

As a result of the facts described above, it would not be technically possible for Vonage to provide written notice to every customer who uses its service in Minnesota. For example, Vonage's customers can sign up for DigitalVoice over the Internet. Because Vonage does not

Services, 612 N.W.2d 456 (Minn.Ct.App. July 3, 2000) (stating that the fundamental requirement of due process is to be heard at a meaningful time and in a meaningful manner).

See Northwestern Bell Tel. Co., 371 N.W. 2d 563, 565 (Minn.Ct. App.1985) (the MPUC only has the "powers expressly delegated by the legislature and those fairly implied by and incident to those expressly delegated") (citing Great Northern Railway Co. v. Pub. Serv. Comm'n, 284 Minn. 217 (Minn.1969)). Minnesota statutes only grant the Commission jurisdiction over intrastate matters.

provision facilities to its customer, the customer can give Vonage a billing address that is different from the customer's physical location. In fact, some customers may not provide a physical address at all if they sign up for credit card billing and email notifications. John Rego Affidavit at ¶ 5. Thus, while Vonage could technically mail notices to all customers who have given it a Minnesota address, Vonage does not know whether that would include all who actually use the service in Minnesota.

Because at least two of the four requests for temporary relief are not technically feasible, the Commission should deny these DOC requests.

Conclusion

The DOC has not satisfied all three statutory criteria for temporary relief. Because DigitalVoice performs a net protocol conversion and Vonage does not provide facilities to its customers, DigitalVoice is not a "telephone service" subject to the Commission's jurisdiction. At a minimum, the question of whether DigitalVoice is a "telephone service" is a novel question that has not been addressed in Minnesota and the DOC cannot show that it is likely to succeed on the merits. Moreover, the temporary relief the DOC requests is not "necessary to protect the public's interest in fair and reasonable competition." To the contrary, it would deprive Minnesota consumers of a competitive alternative to traditional telephone service. Finally, aside from the fact that the Commission does not have jurisdiction to award some of the requested relief, certain aspects of the temporary relief requested by the DOC are not technically feasible. The Commission should deny the DOC's request for temporary relief and determine whether it even has jurisdiction to refer this matter for an expedited proceeding.

Respectfully submitted,

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Exhibit 4

Answer of Vonage Holdings Corporation, Docket No. P6214/C-03-108 (filed Jul. 30, 2003)

STATE OF MINNESOTA BEFORE THE PUBLIC UTILITIES COMMISSION

LeRoy Konnendrayer

LeRoy Koppendrayer Gregory Scott Phyllis Reha Marshall Johnson	Chair Commissioner Commissioner
In the Matter of the Complaint of the Minnesota Department of Commerce Against Vonage Holding Corp Regarding Lack of Authority to Operate in Minnesota	Commissioner)))) Docket No. P6214/C-03-108)

Vonage Holdings Corporation ("Vonage"), by and through its undersigned counsel, hereby answers the Complaint of the Minnesota Department of Commerce ("DOC" or "Department") in the above-captioned proceeding, pursuant to Minn. Stats. § 237.462, subd. 7(e).

ANSWER OF VONAGE HOLDINGS CORPORATION

As explained below, Vonage denies the claim of the DOC that Vonage is violating Minnesota law. Vonage is not offering telephone service in Minnesota, and therefore is not subject to the certification requirements and other obligations cited by the DOC in its Complaint.

Vonage opposes the DOC's request for an expedited proceeding. Moreover, as explained herein and in Vonage's Motion to Dismiss, Vonage believes that the appropriate classification of Voice over Internet Protocol ("VoIP") services is an issue of first impression in Minnesota and as such, would be better addressed in a workshop open to all interested parties, rather than a contested case proceeding. A VoIP workshop would provide all interested parties notice and an opportunity to participate. It would also allow the Minnesota Public Utilities Commission ("Commission") to gather facts concerning VoIP services provided in Minnesota and obtain a better understanding of the technology used to provide VoIP services, as well as technical complexities related to any potential application of 911 rules to such technologies. Finally, a

workshop would permit the Commission to develop a full record on the policy implications of VoIP, including federal/state jurisdictional issues, and on the potential application of 911 rules to such new technologies.

In answer to the specific allegations of the Complaint, Vonage states as follows:

- 1. This statement does not require an admission or denial by Vonage.
- 2. Admitted, except that the correct name of the company is "Vonage Holdings Corporation".
- 3. Admitted that Minn. Stat. § 216A.07 makes the DOC responsible for the enforcement of Chapter 237, *inter alia*. Denied that the DOC's investigation establishes any violation of law by Vonage, for the reasons described below.
- 4. Admitted that the Commission has authority to decide whether it possesses jurisdiction over the allegations in the DOC's Complaint. Denied that the Commission has jurisdiction over Vonage's business or its service. Denied that the DOC's request for temporary relief meets the statutory criteria, for the reasons stated in Vonage's July 22, 2003 Response (see Exhibit VHC-1.). On July 24, 2003, the Commission agreed, denying the DOC's request for temporary relief. Further, as explained below and in Vonage's Motion to Dismiss, Vonage provides an information service that is not subject to the Commission's jurisdiction over telephone services, telephone companies, and telecommunications carriers. The Commission's jurisdiction under Minnesota statutes, moreover, is subject to preemption to the extent that state law requirements are inconsistent with Federal law or rules, or impose an undue burden on interstate commerce.
- 5. Vonage does not know when or how the DOC was "alerted" to Vonage's business operations, so the first sentence of this paragraph is neither admitted nor denied. Vonage admits

that the statements quoted in the remaining sentences, and the material contained in Exhibits DOC-1 and DOC-2, did appear on Vonage's website.

- 6. Admitted that Exhibit DOC-2 appeared on Vonage's website. Admitted that Exhibit DOC-2 refers to "popular features" and lists the services that are included in Digital-Voice™. Admitted that Exhibit DOC-2 states that a customer "can keep their current numbers or choose telephone numbers" but denied that Exhibit DOC-2 uses the phrase "local number portability." Admitted that some, but not all, of the listed services are typically offered with traditional local wireline telecommunications service. As stated on Vonage's website, Vonage provides "an affordable alternative to traditional phone service." Vonage's service performs a form of data processing that perhaps was not foreseen in 1980, but is now feasible due to advances in technology: it processes voice communications into digital data and routes them over data networks, allowing users to place and receive telephone calls without a telephone line, through their broadband Internet connection. Nonetheless, the FCC did foresee the fact that the boundary between traditional communications and data processing would be blurry, and the mere fact that two services "do some of the same things" does not mean they should be regulated similarly.
- 7. Admitted that the DOC sent a letter to Vonage as described in this paragraph, and that Exhibit DOC-3 is a copy of that letter, although Vonage does not admit to the truth of the matters asserted in that letter.
- 8. Admitted that Vonage's then-counsel sent a letter to the DOC as described in this paragraph, and that Exhibit DOC-4 is a copy of that letter, the content of which speaks for itself.
- 9. Vonage does not know when or whether the DOC spoke with a Vonage customer, and therefore cannot admit or deny the first two sentences of this paragraph. Admitted that

Vonage responded to Information Requests ("IRs") as described in the third and fourth sentences. Although it is admitted that the fifth sentence accurately describes FCC rules, this allegation is irrelevant and misleading. Vonage has not attempted or purported to receive telephone numbers from NANPA. The telephone numbers used by Vonage in providing its information service are assigned to certificated telecommunications carriers. Vonage obtains the use of these telephone numbers as a customer, by subscribing to a carrier's telecommunications services.

- 10. Admitted that Exhibit DOC-5 is an excerpt from a presentation made by Vonage to the North American Numbering Council, and that this excerpt illustrates (very generically) typical call flows to and from Vonage customers, as well as a typical customer premise equipment ("CPE") configuration. None of these diagrams, however, is sufficiently detailed to be relied upon as a complete technical description of the Vonage service. Admitted that, during a call between a Vonage customer and a non-Vonage customer, a portion of the call may travel over the Public Switched Telephone Network ("PSTN").
- 11. Admitted that Vonage responded to DOC Information Requests; that the Vonage customer's Multimedia Terminal Adapter ('MTA") encodes voice signals as digital packets compatible with Internet Protocol ("IP"); and that the Vonage DigitalVoice™ service converts IP packets into a synchronous digital format compatible with Time Division Multiplexing ("TDM"), and hands off traffic to an interexchange carrier to terminate traffic to a non-Vonage customer. Admitted that, at the time Vonage responded to the DOC's requests, all Minnesota traffic was handed off to the interexchange carrier named in this paragraph at a location in Burbank, California, although since that time Vonage has subscribed to services from an additional interexchange carrier that now terminates some Minnesota calls.

- Admitted that the FCC issued a Report to Congress in 1998. That Report speaks 12. for itself. Although the FCC considered, among other issues, the classification of IP telephony, Vonage denies that the FCC used the four factors listed by the DOC to determine whether IP telephony is a telecommunications service. Rather, the four factors define a specific IP telephony service, phone-to-phone IP telephony. The FCC considered whether this service, as tentatively defined, was an information service or a telecommunications service. However, the FCC refused to declare categorically that every service that met its four tentative criteria would necessarily be a telecommunications service, concluding that "[w]e do not believe ... that it is appropriate to make any definitive pronouncements in the absence of a more complete record focused on individual service offerings." Federal-State Joint Board on Universal Service, Report to Congress, 13 FCC Rcd. 11501, ¶ 90 (1998) ("Report to Congress"). In fact, the FCC has at least six open dockets in which it is addressing regulatory issues associated with VoIP, including whether specific VoIP services are telecommunications or information services. (See Vonage Motion to Dismiss.) Finally, the DOC has misrepresented the second tentative criterion in the FCC's definition. The second criterion is: "it does not require the customer to use CPE different from that CPE necessary to place an ordinary touch-tone call." Report to Congress at ¶ 88 (emphasis added).
- 13. Admitted that Vonage has claimed that DigitalVoice™ is an information service.
 47 USC §253(20) speaks for itself.
- 14. Denied that the FCC, in the *Report to Congress*, considered an IP telephony service that is the equivalent of DigitalVoiceTM. Denied that the quoted passage describes the functionalities of DigitalVoiceTM. Contrary to the DOC's implication, DigitalVoiceTM does not meet two of the four tentative criteria the FCC identified for phone-to-phone IP telephony that

"bears the characteristics of" telecommunications services. First, because a Vonage customer must use CPE different from the CPE used to place an ordinary touch-tone call, specifically the MTA (i.e., a computer), Vonage's service does not meet the second tentative criterion the FCC set forth for phone-to-phone IP telephony. Second, because Vonage's service performs a net protocol conversion end-to-end, it does not meet the fourth tentative FCC criterion. Moreover, the FCC refused to declare categorically that every service that met its four tentative criteria would necessarily be a telecommunications service, concluding that "[w]e do not believe ... that it is appropriate to make any definitive pronouncements in the absence of a more complete record focused on individual service offerings." Report to Congress at ¶ 90.

- 15. Denied that Vonage markets DigitalVoice™ as a "telecommunications service" as that term is defined in 47 USC §153(46). Denied that the term "phone service" is the equivalent of the term "telecommunications service," as the DOC implies. Admitted that Exhibit DOC-1 appears on Vonage's website and includes the term "phone service". Vonage's service performs a form of data processing that perhaps was not foreseen in 1980, but is now feasible due to advances in technology: it processes voice communications into digital data and routes them over data networks, allowing users to place and receive telephone calls without a telephone line, through their broadband Internet connection. Nonetheless, the FCC did foresee the fact that the boundary between traditional communications and data processing would be blurry, and the mere fact that two services "do some of the same things" does not mean they should be regulated similarly.
- 16. Admitted that Vonage's website does not use the term "information service". Denied that Vonage is required to use the term "information service" on its website in order for its service to be clasified for regulatory purposes as an information service. Admitted that Vonage's

website does not include a statement concerning compliance with state requirements applicable to telephone services or to owners or operators of telecommunications systems. Denied that Vonage is required to post a notice on its website concerning 911 or consumer protection related requirements that apply to telephone services or to owners or operators of wire line or wireless telecommunications systems, or to wireline or wireless telecommunications service providers in Minnesota. Because Vonage is not a telephone company and does not provide telephone service, nor is it an owner or operator of a wireline or wireless telecommunications system, nor is it a wireline or wireless telecommunications service provider, as those terms are defined in Minnesota statutes, Vonage is not required to comply with these requirements. Admitted that Exhibit DOC-1 appears on Vonage's website. That Exhibit speaks for itself. Denied that the DOC's characterization of the Exhibit is accurate.

- 17. Admitted that Exhibit DOC-6 appeared on Vonage's website at one time and the quote and line count are from Exhibit DOC-6.
- 18. Admitted that Exhibit DOC-5 is an excerpt from a presentation made by Vonage to the North American Numbering Council, and that this excerpt illustrates (very generically) typical call flows to and from Vonage customers, as well as a typical customer premise equipment configuration. None of these diagrams, however, is sufficiently detailed to be relied upon as a complete technical description of the Vonage service. Admitted that Exhibit DOC-5 states that DigitalVoice™ works with any touch-tone phone. Admitted that a touch-tone telephone is CPE used by end users of telephone service. However, in addition to a touch-tone phone, Vonage's customer must install special CPE, namely the MTA and, in some configurations a router or IP phone, and must have a third-party provide a broadband connection to the Internet in order to use Vonage's service. Therefore, while a touch-tone phone works with Vonage's

service, the customer also needs equipment different from traditional telephone CPE in order for that touch-tone phone to work.

- 19. Admitted that once a DigitalVoice™ customer has installed certain special equipment, such as an MTA, and registered that equipment with the Vonage network, the customer may place calls to telephone numbers in the North American Numbering Plan.
- 20. Denied that the DOC accurately characterized the *Report to Congress*, which speaks for itself. The *Report to Congress* focused on a phone-to-phone IP telephony service that the FCC tentatively defined as one that transmits customer information without a net change in form or content. Footnote 188 refers to this narrowly defined service. Denied that Vonage's service meets the FCC's tentative four-prong definition of phone-to-phone IP telephony.
- 21. Denied that the DOC accurately characterized the FCC's Notice of Proposed Rulemaking in CC Docket Nos. 02-33, 95-20, 98-10 (rel. Feb. 15, 2002), which speaks for itself.
- 22. Admitted that Vonage offers an alternative to traditional phone service offered by certificated carriers in Minnesota. Admitted that Vonage's service provides real-time, two-way voice communication. Denied that Vonage provides and/or offers to provide "telephone service", as that term is statutorily defined in Minnesota. Denied that the DOC's characterization of Vonage's representation of its service is accurate. Denied that DigitalVoice™ transmits customer information without a net change in form. Vonage provides a net protocol conversion from IP to TDM on Vonage to PSTN traffic and from TDM to IP on PSTN to Vonage traffic. When a Vonage customer calls another Vonage customer, that call is carried solely over the Internet and does not touch the PSTN. Denied that Vonage's customers only use standard CPE. Vonage customers must use CPE different from traditional CPE, including an MTA, a broadband connection to the Internet provided by a third party, and in some configurations, a router or an IP

phone. Admitted that once a customer has installed certain equipment, and registered that equipment with the Vonage network, the customer may place calls to telephone numbers within the North American Numbering Plan. Vonage does not know when or whether the DOC spoke with a Vonage customer. Denied that the DOC has provided information received from Vonage customers.

- 23. Denied. Vonage provides an information service that is not subject to the Commission's certification requirements.
- 24. Admitted that the New York Public Service Commission adopted an order in Case 01-C-1119 that resolved a complaint filed by an incumbent local exchange carrier against a VoIP provider for the payment of access charges. Denied that the DOC's characterization of that order is accurate; the order speaks for itself. Denied that the VoIP service at issue before the New York Commission is similar to Vonage's service. In the New York case, the VoIP call was converted from circuit-switched format to IP format back to circuit-switched format, resulting in no net protocol conversion. In addition, only 60% of the calls actually used IP format for the middle leg. A copy of the New York Commission's decision is attached as Exhibit VHC-2. Admitted that the Washington and Ohio Commissions have opened dockets to address VoIP issues. The Washington Commission has not yet issued an order opening the docket. See Exhibit VHC-3. The Ohio Commission's Entry opening its docket states that the "threshold legal issue is whether a company providing VoIP services is 'transmitting telephonic messages' for purposes of Section 4905.03, Revised Code." See Exhibit VHC-4. Vonage believes that the appropriate classification of VoIP services is an issue of first impression in Minnesota and as such, would be better addressed in a workshop open to all interested parties. A VoIP workshop would provide all interested parties notice and an opportunity to participate. It would also allow

the Commission to gather facts concerning VoIP services provided in Minnesota and obtain a better understanding of the technology used to provide VoIP services. Finally, a workshop would permit the Commission to develop a full record on the policy implications of VoIP, including federal/state jurisdictional issues.

- 25. Admitted that Exhibit DOC-7 appeared on Vonage's website and the statements in paragraph 25 appear in Exhibit DOC-7. Denied that Vonage's voluntary provision of an interim 911 dialing solution is required by federal or state law.
- Admitted that Vonage has never submitted a 911 Plan in Minnesota. Denied that Vonage is required to submit a 911 Plan. Denied that Vonage is required to comply with Minnesota state 911 requirements, including, but not limited to Minnesota Rules Chapter 1215 that apply only to telephone companies providing telephone service, or to owners or operators of wireline or wireless telecommunications systems, or to wireline or wireless telecommunications service providers. Vonage is not a telephone company and does not provide telephone service; Vonage is not an owner or operator of a wireline or wireless telecommunications system, nor is Vonage a wireline or wireless telecommunications service provider; Vonage provides an information service. Admitted that Exhibits DOC-8 and DOC-9 contain Affidavits. Denied that the Affiants have sufficient knowledge of the facts of Vonage's service, or sufficient expertise, to make a legal determination as to whether Vonage is exempt from or subject to federal or state 911 rules.
- 27. Admitted that Exhibit DOC-7 appeared on Vonage's website and the statements in paragraph 25 appear in Exhibit DOC-7. Denied that Vonage's voluntary provision of an interim 911 dialing solution is required by federal or state law. Under Vonage's interim 911 dialing solution, Vonage routes 911 calls to the PSAP's ten- or seven-digit local number. On

information and belief, Vonage understands that other 911 emergency calls, including Telecommunications Relay Service ("TRS"), telematics, and CMRS, are also routed to the PSAP's tenor seven-digit local number.

28. Denied that Exhibit DOC-8 contains Minnesota 911 standards or that the first sentence of paragraph 28 accurately sets forth Minnesota 911 standards, which speak for themselves. Denied that Minnesota 911 standards or actual practice prohibit the routing of emergency calls by alternate means. On information and belief, Vonage understands that other 911 emergency calls, including TRS, telematics, and CMRS, are also routed to the PSAP's ten- or sevendigit local number. Vonage demands strict proof of the claimed standards, exceptions or waivers made to native 911 routing, and permissions granted to the entities that currently route emergency calls by alternate means other than the native 911 network. Denied that Vonage never consulted the Minnesota Metropolitan 911 Board ("911 Board") or Department concerning its interim 911 dialing solution. Vonage authorized its 911 solutions provider, Intrado, to consult with the 911 Board on its behalf. See Exhibits VHC-5 and VHC-6. Intrado has advised Vonage that Intrado spoke with, and met with, Nancy Pollock, of the 911 Board. Intrado further advised Vonage that Ms. Pollock refused to discuss the means by which Vonage could voluntarily provide basic and enhanced 911 using the native 911 network. Vonage also answered all of the Department's IRs concerning 911 service and offered to meet with the Department to discuss its concerns. However, the Department refused to meet with Vonage. See Exhibit VHC-7. Admitted that Vonage did not consult the Commission concerning its interim 911 solution; denied that Vonage was required to do so. Following the July 25, 2003 meeting of the Commission, Vonage met with the representatives of the 911 Board and the Minnesota Department of Administration ("Administration") and has voluntarily agreed to provide further information to the Board and Administration concerning Vonage's interim and permanent 911 solutions. Vonage remains willing to work with the 911 Board and the Department, on a voluntary basis as an information service provider, to implement a permanent 911 solution that uses the native 911 network and provides PSAPs Automatic Number Identification ("ANI") and Automatic Location Information ("ALI").

- 29. Admitted that Vonage has not consulted with Minnesota PSAPs and did not receive the consent of the 911 Board, Administration, Department, or Commission prior to implementing its interim 911 solution; denied that Vonage is required to consult with them or to receive prior permission to route emergency calls to a published ten- or seven-digit local number for the PSAP. To the contrary, published directories include these ten- or seven-digit local numbers for the PSAP. For example, the Qwest Dex white pages directories for Minneapolis and Saint Paul, on the page regarding the use of 911, directs users to "refer to the government listings for the administrative numbers of public safety agencies." In the government listings, the directory states "Police/Fire/Medical Response 911. If You Cannot Complete Your Call Using 911 Call..." followed by a ten digit telephone number. See Exhibit VHC-8.
- 30. Vonage has no knowledge of whether each PSAP's administrative number is equipped to answer emergency calls and therefore neither admits nor denies this paragraph. To the extent that the PSAP's administrative number may handle emergency calls routed by other entities, Vonage demands strict proof of why those numbers are equipped to handle emergency calls routed by other entities but not emergency calls routed by Vonage. Vonage has no knowledge of whether each PSAP's administrative number is equipped to receive ANI/ALI information, or is otherwise not equipped as alleged in the second and third sentences of paragraph 30. Vonage specifically advises its customers that their 911 call will go to a general access line at the

PSAP, not the 911 Emergency Response Center where traditional 911 calls go, and that because the PSAP will not have the customer's location and telephone number, the customer will be required to provide this information. (See Exhibit VHC-9.) The current terms and conditions applicable to Vonage's interim 911 solution are included in Exhibit VHC-10.

- 31. Vonage has no knowledge of the Department's efforts to contact other VoIP providers, the features of the VoIP services those other providers offer, or whether those VoIP providers offer a telecommunications service in addition to their VoIP service, and therefore neither admits nor denies this paragraph.
- 32. Admitted that Vonage has not directly deposited any 911 fees to the State of Minnesota. However, as an information service provider that purchases telecommunications services, Vonage has paid 911 fees to the carriers that sell Vonage telecommunications services. Denied that 911 fees are required to be collected from customers that purchase information services. Denied that Exhibit DOC-9 provides evidence that Minnesota statutes governing 911 fees apply to information service providers.
- 33. Denied that Vonage provides telephone service in Minnesota. Admitted that Vonage has not filed any tariffs in Minnesota. As an information service provider, Vonage is not subject to the tariffing requirements applicable to telecommunications carriers.
- 34. Admitted that Exhibit DOC-10 appeared on Vonage's website and the statements in this paragraph appear in Exhibit DOC-10. Denied that Vonage's terms and conditions for the offering of an information service are subject to rules that apply to telephone utilities offering telecommunications services. Vonage's current terms and conditions of service are attached as Exhibit VHC-10.

35. Denied that the Department has attempted to resolve its concerns with Vonage informally. Denied that Vonage has "declined efforts" at informal resolution and "refused" to answer any IR. Vonage answered all 20 IRs submitted by the Department and required clarification only with respect to one (of numerous) subparts of the 20 IRs. Specifically, Vonage questioned why the Department needed a copy of a confidential contract between Vonage and one of its service providers for the purchase of interexchange services. Vonage offered to meet with the Department to discuss production of the contract and its concerns, but the Department refused. See Exhibit VHC-7. Denied that the Administration and 911 Board attempted to resolve 911 concerns with Vonage informally. Vonage has never received correspondence from the Administration. The 911 Board did not contact Vonage directly until a letter dated June 26, 2003 was sent to Vonage by Nancy Pollock. See Exhibit VHC-11. Intrado has represented to Vonage that at a meeting on July 7, 2003, Nancy Pollock of the 911 Board refused to discuss alternative 911 solutions with Vonage's 911 solutions provider, Intrado. Admitted that it is Vonage's position that, as an information service provider, Vonage is not required to comply with certification and 911 requirements that apply to telephone companies and telephone services, or to owners or operators of wireline or wireless telecommunications systems, or to wireline or wireless telecommunications service providers. Following the July 25, 2003 meeting of the Commission, Vonage met with the representatives of the 911 Board and the Administration and has voluntarily agreed to provide further information to the 911 Board and Administration concerning Vonage's interim and permanent 911 solutions. Vonage remains willing to work with the 911 Board, Administration and the Department, on a voluntary basis as an information service provider, to address any concerns about its current 911 service and to implement a permanent 911 solution

that uses the native 911 network and provides PSAPs Automatic Number Identification ("ANI") and Automatic Location Information ("ALI").

- 36. Minnesota Stat. §237.16, subd. 1(b) speaks for itself.
- 37. Minnesota Stat. §237.74, subd. 12 speaks for itself.
- 38. Minnesota Rule 7812.0200, subp. 1 speaks for itself.
- 39. Denied that Vonage is providing telecommunications services or local exchange services in Minnesota or operating without authority. Admitted that Vonage has not obtained a certificate of authority from the Commission. As an information service provider, Vonage is not required to obtain a certificate before offering services in Minnesota. Admitted that as of July 23, 2003, Vonage offered its information service to approximately 426 customers in Minnesota.
- 40. Admitted that the Commission grants certificates based on the type of telephone service being provided to customers. Denied that Vonage's information service is a telephone service subject to the Commission's certification requirements. Vonage has no knowledge of the Commission's actions in Docket No. P9981/NA-00-1530 and therefore neither admits nor denies the last sentence of paragraph 40. Denied that the statements in the first sentence accurately characterize any "approach" of the FCC.
- 41. Denied that Vonage has violated the cited Minnesota statutes and rules. Those rules apply to telephone services, telecommunications services, or telecommunications carriers. For the reasons stated herein, Vonage does not provide telephone services or telecommunications services and Vonage is not a telecommunications carrier.
 - 42. Minnesota Rule 7812.0550 subpt. 1 speaks for itself.
- 43. Denied that Vonage is required to submit a 911 Plan to the Commission. Admitted that Vonage has not submitted a 911 Plan to the Commission in Minnesota.

- 44. Denied that Vonage has violated the Rules cited.
- 44a. With respect to the first unnumbered paragraph of Count III, Minnesota Stat. § 237.49 speaks for itself.
- 45. Admitted that Vonage has not remitted any 911 fees directly to the Department of Administration. Denied that Vonage is required to do so. However, as an information service provider that purchases telecommunications services, Vonage has paid 911 fees to the carriers that sell Vonage telecommunications services. Denied that 911 fees are required to be collected from customers that purchase information services.
 - 46. Denied that Vonage has violated the statute cited.
 - 47. Minnesota Stat. § 237.07 speaks for itself.
- 48. Denied that Vonage conducts a telephone business in Minnesota. Admitted that Vonage has not filed any tariffs in Minnesota. As an information service provider, Vonage is not subject to the tariffing requirements applicable to telephone companies.
 - 49. Denied that Vonage has violated the statute cited.
- 50. Minnesota Stat. § 237.462, subd. 7 speaks for itself. Because the Commission has already denied the DOC's request for temporary relief, no further response to this paragraph is necessary.
- 51. For the reasons stated in Vonage's July 22, 2003 Response, denied that the DOC is likely to succeed on the merits of its Complaint. Denied that Vonage's 911 service poses a threat to the public safety of Minnesotans. The remaining sentences in this paragraph are repetitions of the claims made in paragraphs 7, 26, 29, and 35-44. Vonage incorporates its responses to paragraphs 7, 26, 29 and 35-44 as if fully restated herein. Because the Commission has

already denied the DOC's request for temporary relief, no further response to this paragraph is necessary.

- 52. For the reasons stated in Vonage's July 22, 2003 Response, denied that an order for temporary relief is necessary to protect the public's interest. Because the Commission has already denied the DOC's request for temporary relief, no further response to this paragraph is necessary.
- 53. Denied that Vonage is providing unauthorized service. Because the Commission has already denied the DOC's request for temporary relief, no further response to this paragraph is necessary.
- 54. For the reasons explained in Vonage's July 22, 2003 Response, certain aspects of the temporary relief requested by the DOC are not technically feasible. Because the Commission has already denied the DOC's request for temporary relief, no further response to this paragraph is necessary.
- 55. Because the Commission has already denied the DOC's request for temporary relief, no response to this paragraph is necessary.
- 56. Because the Commission has already denied the DOC's request for temporary relief, no response to this paragraph is necessary.
- 57. Because the Commission has already denied the DOC's request for temporary relief, no response to this paragraph is necessary.
- 58. Because the Commission has already denied the DOC's request for temporary relief, no response to this paragraph is necessary.
- 59. Vonage opposes the DOC's request for an expedited proceeding. Denied that Vonage is operating without proper certification, in violation of 911 rules, and without proper

- tariffs. Denied that Vonage's interim 911 dialing solution raises safety concerns that justify resolving this matter promptly. Vonage's customers are at no more risk in an emergency than the customers of other entities that deliver 911 calls to the PSAPs via administrative numbers.
- 60. Denied that Vonage knowingly and intentionally violated cited Minnesota Rules and Statutes. Vonage is an information service provider that is not subject to the cited Minnesota Rules and Statutes. Vonage has a good faith basis for claiming information service provider status and an exemption from Minnesota Rules and Statutes applicable to telephone service and telephone companies.
- 61. Denied that Vonage is currently out of compliance with all Minnesota Statutes and Rules relating to the offering of telephone service.
- 62. Denied that Vonage is a telephone service provider or a wireline or wireless telecommunications service provider required to remit 911 fees directly to the Department of Administration.
 - 63. Denied that penalties are appropriate under Min.. Stat. § 237.461 or .462.
- 64. Denied that the DOC is entitled to any relief. The Commission should dismiss the DOC's Complaint with prejudice.

AFFIRMATIVE DEFENSES

- 65. Vonage incorporates paragraphs 1-64 as if fully restated herein.
- 66. For the reasons specified in Vonage's Motion to Dismiss, the Commission should dismiss the DOC's Complaint for lack of subject matter jurisdiction.
- 67. For the reasons specified in Vonage's Motion to Dismiss, the Commission should dismiss the DOC's Complaint for failure to state a claim upon which relief could be granted.

- 68. Because this is an issue of first impression in Minnesota, the Commission should dismiss the DOC's Complaint and open a VoIP workshop. Alternatively, the Commission should, at a minimum, stay this proceeding until it conducts a VoIP workshop. A VoIP workshop would provide all interested parties notice and an opportunity to participate. It would also allow the Commission to gather facts concerning VoIP services provided in Minnesota and obtain a better understanding of the technology used to provide VoIP services, as well as technical complexities related to any potential application of 911 rules to such technologies. Finally, a workshop would permit the Commission to develop a full record on the policy implications of VoIP, including federal/state jurisdictional issues, and on the potential application of 911 rules to such new technologies. Other state commissions, including Florida, Illinois, and Ohio, have conducted VoIP workshops.
- 69. The Commission's jurisdiction under Minnesota statutes is subject to preemption to the extent that state law requirements are inconsistent with Federal law or rules, or impose an undue burden on interstate commerce. Because the FCC is considering issues related to VoIP in at least six open dockets, including issues related to the technical and administrative complexities and constraints on the FCC's ability to extend basic and enhanced 911 (E911) requirements to VoIP-based technologies and other non-traditional devices, systems and services, the Commission should refrain from taking any action pending the resolution of these issues before the FCC.
- 70. Vonage has a good faith basis for claiming information service provider status and an exemption from Minnesota Rules and Statutes applicable to telephone service and telephone companies, to owners or operators of wireline or wireless telecommunications systems, or to wireless telecommunications service providers.

WHEREFORE, Vonage requests the complaint of the Department of Commerce be dismissed in its entirety with prejudice.

Dated: July 30, 2003.

GRAY, PLANT, MOOTY, MOOTY

& BENNETT, P.A.

Ву

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ATTORNEYS FOR VONAGE HOLDINGS CORP.

Exhibit 5

Motion to Dismiss of Vonage Holdings Corporation, Docket No. P6214/C-03-108 (filed Jul. 30, 2003)

STATE OF MINNESOTA BEFORE THE PUBLIC UTILITIES COMMISSION

LeRoy Koppendrayer	Chair
Gregory Scott	Commissioner
Phyllis Reha	Commissioner
Marshall Johnson	Commissioner
In the Matter of the Complaint of the)
Minnesota Department of Commerce)
Against Vonage Holding Corp)
Regarding Lack of Authority to Operate	Docket No. P6214/C-03-108
in Minnesota)
)

MOTION TO DISMISS OF VONAGE HOLDINGS CORPORATION

Vonage Holdings Corporation ("Vonage"), by and through its undersigned counsel, hereby submits its Motion to Dismiss the Complaint of the Minnesota Department of Commerce ("DOC" or "Department") in the above-captioned proceeding.

For the reasons specified in its Answer and herein, Vonage urges the Minnesota Public Utilities Commission ("Commission") to dismiss the DOC's Complaint. Vonage believes that the appropriate classification of Voice over Internet Protocol ("VoIP") services is an issue of first impression in Minnesota and as such, would be better addressed in a workshop open to all interested parties.

Even if the Commission declines to open a VoIP workshop, the DOC's Complaint should be dismissed for a number of other reasons. First, the Commission lacks subject matter jurisdiction over the information service Vonage provides. Moreover, the Commission's jurisdiction under Minnesota statutes is subject to preemption to the extent that state law requirements are inconsistent with Federal law or rules, or impose an undue burden on interstate commerce. Finally, the DOC has failed to plead essential elements of its claim, and therefore has failed to state a claim upon which relief could be granted.

The Commission Should Dismiss the Complaint and Open a VoIP Workshop

Vonage submits that the issue of whether the Commission can regulate services provided over the Internet is a novel legal question that has never before been addressed by this agency or the Minnesota courts. Because the potential pre-emptive effect of Federal law is unclear in this context, the Commission may determine that even if Vonage's service meets the definition of a "telephone service" under Minnesota statutes (it does not), the Commission does not even have jurisdiction to hear the DOC's Complaint because its jurisdiction is preempted by federal law. These questions deserve full and thoughtful consideration by the Commission, and should not be prejudged hastily. Because this is an issue of first impression in Minnesota, the Commission should dismiss the DOC's Complaint without prejudice and open a VoIP workshop.\(^1\) A VoIP workshop would provide all interested parties notice and an opportunity to participate. It would also allow the Commission to gather facts concerning VoIP services provided in Minnesota and obtain a better understanding of the technology used to provide VoIP services. Finally, a workshop would permit the Commission to develop a full record on the policy implications of VoIP, including federal/state jurisdictional issues.

Contrary to the DOC's allegations, the FCC has never declared any form of VoIP to be a telecommunications service. Currently, there are two declaratory ruling petitions concerning VoIP pending before the FCC. AT&T Corp.'s ("AT&T") October 18, 2002 petition seeks a declaratory ruling that: (1) AT&T's phone-to-phone VoIP services that are carried over the Internet are entitled to subscribe to local services and are permanently exempt from any requirement that they subscribe to access services; and (2) all other phone-to-phone VoIP services are exempt from access charges until the FCC adopts regulations that prospectively provide otherwise. Pulver.com's February 5, 2003 petition seeks a declaratory ruling that its Free World Dialup ("FWD") VoIP service is neither "telecommunications" nor a "telecommunications service" that is subject to federal regulation. The FCC has accepted comments on these two

Alternatively, the Commission could hold in abeyance this complaint proceeding until the conclusion of its VoIP workshop.

petitions, but has not yet issued any rulings. Indeed, in a recent ex parte letter, the National Association of Regulatory Utility Commissioners ("NARUC") urged the FCC, consistent with a NARUC resolution, to refer VoIP issues to a Joint Conference:

the resolution solicits the 706 Joint Conference to systematically address issues relating to VOIP and to explore, with the States, the appropriate joint boards, and industry, mutually satisfactory methods of dealing with the related jurisdictional rate and separations issues, including but not limited to reviewing, revising and simplifying the varied existing intercarrier compensation regimes while preserving universal service.²

While the AT&T and Pulver.com petitions pose very specific, factual scenarios, and request specific relief, the FCC is also considering VoIP issues generally in other open dockets, including its intercarrier compensation,³ wireline broadband,⁴ universal service,⁵ and 911⁶ dockets. In fact, the Chief of the Wireline Competition Bureau, William Maher, recently stated that examining the regulatory treatment of VoIP is a key priority of the FCC.⁷

A number of states have opened VoIP workshops, or other generic proceedings, to address VoIP issues. In January, 2003, the Florida Public Service Commission sponsored a VoIP Workshop that never developed into a docketed proceeding. Recently, the Florida legislature enacted legislation that explicitly freed VoIP services from unnecessary regulation: "The

² Letter from James Bradford Ramsay, General Counsel, National Association of Regulatory Utility Commissioners, to Marlene H. Dortch, Secretary, Federal Communications Commission (July 25, 2003), ex parte filed in WC Docket Nos. 02-361 and 03-45. See Exhibit 1.

³ See Developing a Unified Intercarrier Compensation Regime, CC Docket No. 01-92, ¶¶ 5, 12, 24, and 52 (rel. Apr. 27, 2001). See excerpts in Exhibit 2.

⁴ See Appropriate Framework for Broadband Access to the Internet over Wireline Facilities, Universal Service Obligations of Broadband Providers, CC Docket No. 02-33.

See Federal-State Joint Board on Universal Service, CC Docket No. 96-45, et al.

⁶ See Revision of the Commission's Rules to Ensure Compatibility With Enhanced 911 Emergency Calling Systems, CC Docket No. 94-102; IB Docket No. 99-67, Further Notice of Proposed Rulemaking, ¶ 113 (rel. Dec. 20, 2002). See excerpts in Exhibit 2.

⁷ "Maher Cites Key FCC Action Aside from Triennial Review," TR Daily (July 28, 2003).

Legislature further finds that the provision of voice-over-internet protocol (VOIP) free of unnecessary regulation, regardless of the provider, is in the public interest." See Fla. Stat. Ann. § 364.01(3). In May, 2003, the Illinois Commerce Commission staff hosted a VoIP Workshop to gather information about VoIP services. There are no future meetings scheduled as of yet. The Public Utilities Commission of Ohio is currently considering the provision of VoIP services in Case No. 03-950-TP-COI. Comments were due on June 13, 2003 and reply comments were due July 11, 2003. The Pennsylvania Public Utilities Commission also has opened a proceeding concerning VoIP which includes examination of whether the provisioning of such services are within the Pennsylvania Commission's jurisdiction. The Pennsylvania Commission requested that commenting parties respond to 27 specific questions concerning VoIP. Initial comments were due July 1, 2003 and reply comments are due July 31, 2003.

Although a number of open proceedings are pending, the Commission should be aware that no states regulate VoIP and the FCC has also decided to maintain VoIP's unregulated status despite numerous opportunities to impose regulation on such services. Vonage urges the Commission to follow the lead of a majority of state commissions and the FCC and not impose burdensome circuit-switched regulatory obligations on VoIP traffic, particularly until the FCC takes any action in this regard. The reasons for this are two-fold. First, as the NARUC resolution recognizes, VoIP technology presents a difficult regulatory proposition for states due to the difficulty in determining the jurisdictional nature of a particular VoIP call. VoIP is similar to Internet services in that it blurs traditional distinctions between local and long distance services, and between intrastate and interstate services. Packets routed through VoIP networks transmit indistinguishable bits of data in a non-geographical, non-hierarchical manner. For example, on any particular call, Vonage does not know if the Vonage customer originating the call is at home or traveling with her MTA, or if the called party is a Vonage customer (so that the call never touches the PSTN and is completed solely on the Internet). In other words, a state commission seeking to regulate VoIP services would be faced with the daunting task of distinguishing the intrastate portion of a particular type of VoIP service. Such a distinction would be difficult, if not impossible, to establish and thus the Commission should wait until the FCC has provided further guidance on the subject.

Second, as a newly developing technology, VoIP should not be exposed to different regulatory regimes across the country. Such circumstances would hinder the growth and progress of VoIP services as providers become forced to expend valuable resources on unwieldy administrative issues involved in responding to potentially 50 state regulatory regimes and the District of Columbia. Therefore, as part of a VoIP workshop, Vonage recommends that the Commission consider waiting until the FCC is finished with its own proceedings concerning various types of VoIP services, including the 911 proceeding which is evaluating whether and to what extent any E911 requirements should be applicable to VoIP-based services, so that any regulatory burdens imposed by the State of Minnesota are consistent with a federal regulatory framework.

The Commission Does Not Have Subject Matter Jurisdiction Over Vonage's Service

An essential element of the DOC's claim is that Vonage provides "telephone service" in Minnesota. As noted above, the DOC failed to plead the elements necessary to show that Vonage provides telephone service. However, even if it had properly plead its claim, the DOC could not show that Vonage's service is a "telephone service" within the statutory meaning of that term. Vonage does not provide its customers with facilities for communication; rather, the customers must obtain access services independently from an ISP. Although Vonage's service uses communications facilities, a key function of DigitalVoiceTM is to convert the format of the customer's transmission to connect incompatible network protocols. This type of net protocol conversion is the hallmark of an information service, not a communications service, and is not within the scope of the Commission's regulatory jurisdiction.

Minn. Stat. § 237.16 requires Commission authorization before a person may "provide telephone service in Minnesota[.]" The term "telephone service," however, is not defined by statute. Section 237.01 defines "telecommunications carrier" and "telephone company," but both of those definitions also contain and depend on the undefined term "telephone service." There-

fore, the Commission must rely on the Minnesota courts' interpretation of the term, as well as the federal definitions which may supplant the term.

The Minnesota Supreme Court has considered the meaning of "telephone service" in Minnesota Microwave, Inc. v. Public Service Commission, 291 Minn. 241, 190 N.W.2d 661 (1971). It stated that, in the absence of a statutory definition, it would interpret the statutory language as a matter of law, based upon the operative facts found by the Commission. 190 N.W.2d at 664. In that case, the Court held that the statutory definition did not encompass a provider of one-way closed circuit microwave systems for transmitting educational television signals. It stated, among other things, that "[i]t appears that for the most part the term 'telephone service' refers to the supplying of facilities for two-way communication." 190 N.W.2d at 665. However, it also considered the Federal Communications Commission's ("FCC") decisions concerning the meaning of "telephone exchange service," and the legislative purpose of the statutes regulating telephone services. 190 N.W.2d at 666-67. Subsequent decisions by this Commission confirm that the mere existence of a two-way communication is not enough to classify a service as "telephone service," since the Commission decided that the provision of conference calling (which obviously requires two-way communication) is not within that definition. Petition of A Business Conference Call, Inc., Docket No. P-488/TC-97-1814, 1998 WL 1754268 (Minn. PUC). Rather, all aspects of a particular service must be considered in determining whether it falls within the ambit of the legislative phrase "telephone service."

This Commission has previously relied upon FCC precedent for guidance in interpreting the scope of its regulatory jurisdiction.⁸ In this case, the FCC has determined that services like

⁸ See, e.g., AT&T Communications of the Midwest, Inc. v. US West Communications Inc., Order, Docket Nos. P-421/C-99-1183 (Minn. P.U.C. Aug. 15, 2000) (recognizing that the MPUC must consider the jurisdiction of the Federal Communications Commission in certain instances); Petition of US West Communications, Inc. for a Determination that ISP Traffic Is Not Subject to Reciprocal Compensation Payments Under the MFS/US West Interconnection Agreement, Order Denying Petition, Docket Nos. P-3167, 421/CP-99-529 (Minn. P.U.C. Aug. 17, 1999) (considering the Federal Communications Commission's Declaratory Ruling in its intercarrier compensation for ISP-Bound traffic proceeding in determining the appropriate compensation for such traffic); Bridge Water Tel. Co., Order, Docket Nos. P-427, 3075, 3081, 421/C-92-9 (Minn. P.U.C. May 11, 1993) (analyzing extent of Federal Communications Commission jurisdiction over certain services).

Vonage's are not "communications" and therefore are not subject to regulation under Federal law. Vonage's service is an "information service" pursuant to 47 U.S.C. § 153(20). Federal law defines "telecommunications service" as "the offering of telecommunications for a fee directly to the public or to such classes of users as to be effectively available directly to the public regardless of the facilities used." 47 U.S.C. § 153(46). The term "telecommunications" is defined as "transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." 47 U.S.C. § 153(43). The definition of "telecommunications" and "telecommunications service" can be contrasted with "information service," which is defined by the 1996 Act as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service." 47 U.S.C. § 153(20).

The FCC has determined that these statutory definitions are mutually exclusive and parallel the definitions of "basic service" and "enhanced service" developed in the FCC's Computer II proceeding. In this fashion, Congress intended to maintain a regime in which information service providers are not subject to regulation as common carriers merely because they provide their service "via telecommunications." Contrary to the DOC's allegations, Vonage's service satisfies the FCC's definition of an enhanced service and the FCC has never classified services like Vonage's as "telecommunications."

In the Second Computer Inquiry, the FCC defined unregulated "enhanced services" as "services, offered over common carrier transmission facilities used in interstate communications, which [1] employ computer processing applications that act on the format, content, code, proto-

⁹ Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), Docket No. 20828, Final Decision, 77 FCC 2d 384 (1980) ("Computer II"), subsequent history omitted.

col or similar aspects of the subscriber's transmitted information; [2] provide the subscriber additional, different or restructured information; or [3] involve subscriber interaction with stored information." Vonage's service changes the form of the information as sent and received by the user, by converting the asynchronous IP packets generated by the Multimedia Terminal Adaptor ("MTA") into the synchronous TDMA format used by the public switched telephone network (and vice versa). As such, Vonage's provision of VoIP service "employ[s] computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information." While an enhanced service must only meet one of the criteria set out above, Vonage's service also "provide[s] the subscriber additional, different or restructured information."

While the functionality that Vonage provides is similar to that provided by traditional telephone companies, the manner in which Vonage provides its VoIP service is significantly different. In *Computer II*, the FCC recognized that communications and enhanced services could be similar.

We acknowledge, of course, the existence of a communications component. And we recognize that some enhanced services may do some of the same things that regulated communications services did in the past. On the other side, however, is the substantial data processing component in all these services. 13

The FCC concluded that the technological differences between the services justified different regulatory treatment.¹⁴

¹⁰ 47 C.F.R. § 64.702(a).

¹¹ *Id*.

¹² *Id*.

¹³ Computer II at 435 (emphasis added).

The FCC found that it had "ancillary jurisdiction" to regulate enhanced services under Title I of the 1934 Act for the purpose of "assuring a Nation-wide wire and radio communications service with adequate facilities at reasonable charges." However, the FCC declined to exercise this jurisdiction, finding that common carrier regulation of enhanced services is unwarranted. See id.

Vonage's service performs a form of data processing that perhaps was not foreseen in 1980, but is now feasible due to advances in technology: it processes voice communications into digital data and routes them over data networks, allowing users to place and receive telephone calls without a telephone line, through their broadband Internet connection. Nonetheless, the FCC did foresee the fact that the boundary between traditional communications and data processing would be blurry, and the mere fact that two services "do some of the same things" does not mean they should be regulated similarly. Rather, *Computer II* makes clear that it is essential to examine the actual functionality of the Vonage service to determine the appropriate level of regulation.

Vonage's provision of VoIP services does not originate and terminate calls in a format that is compatible with the traditional, circuit-switched telephone network. As noted above, a service may be classified as enhanced if it alters either the content or the format of the customer's transmissions. Vonage does not modify the content of its customers' transmissions, but it does convert these transmissions to provide an interface between otherwise incompatible network protocols. The FCC has specifically held that such protocol conversion services are enhanced, as long as they perform a *net* protocol conversion. ¹⁵ The net conversion test examines

services. Communications Protocols under Section 64.702 of the Commission's Rules and Regulations, Memorandum Opinion, Order, and Statement of Principles, 95 FCC 2d 584, 596 (1983) ("Communications Protocols Decision"). The FCC later summarized this conclusion to stand for the principle that the protocol conversion standard of 64.702(a) does not reach network processing in carrier's networks (setup, takedown and routing of calls or their sub-elements). Waiver of Section 64.702 of the Commission's Rules, Memorandum Opinion and Order, 100 FCC 2d 1057, 1071 (1985).

In its *Third Computer Inquiry*, the FCC restated three exceptions to the rule that protocol processing renders a service enhanced. First, the FCC limited the enhanced services definition to end-to-end communications between or among subscribers. In other words, communications between a subscriber and the network are not enhanced services. Second, protocol conversion required by the introduction of new technology does not qualify as an enhanced service. Thus where innovative "basic" network technology is introduced slowly to the network and conversion equipment is used to maintain compatibility with CPE, the protocol conversion does not render the service enhanced. Third, conversions taking place solely within the network facilitate basic service and are not enhanced. *Amendment of Sections* 64.702 of the Commission's Rules and Regulations (Computer III), Phase II, CC Docket No. 85-229, Report and Order, 2 FCC Rcd 3072, 3081-3082 (1987).

the service on an end-to-end basis from the demarcation point at the premises of the originating caller to the demarcation point where the call will be terminated.¹⁶

Vonage's VoIP service satisfies the FCC's net protocol conversion test and therefore is not originating and terminating its service in the same format. As set out above, the net conversion test examines the service on an end-to-end basis from the demarcation point at the premises of the originating caller to the demarcation point where the call will be terminated. Vonage's service requires the installation of the MTA on the customer's premises. As a result, when a Vonage customer originates a communication, the MTA allows Vonage customers to convert analog voice signals into digital IP data packets that travel over the Internet in an asynchronous mode. Vonage subscribers can also use the MTA to convert digital IP packets that travel over the Internet into analog voice signals when receiving communications. When originating communications, Vonage customers are transforming analog signals into IP data packets and routing the packets over the Internet's packet switched network. Similarly, when a communication terminates at the Vonage Point of Presence, it is carried by the customers of the ISP in data format and is converted from an IP data packet to an analog voice signal at the Customer Premises Equipment ("CPE"). The ultimate digital-to-analog conversion is not performed within the Vonage network, but on the Vonage's customer's premises by CPE, both when originating and receiving a communication. Thus, Vonage's service performs a net protocol conversion as defined by the FCC.

In sum, contrary to the DOC's allegations, ¹⁷ DigitalVoice™ does not meet two of the four tentative criteria the FCC identified for phone-to-phone IP telephony that "bears the characteristics of" telecommunications services. First, because a Vonage customer must use CPE different from the CPE used to place an ordinary touch-tone call, specifically the MTA, Von-

FCC rules define the demarcation point as the point of demarcation and/or interconnection between the communications facilities of a provider of wireline telecommunications, and terminal equipment, protective apparatus or wiring at a subscriber's premises. 47 C.F.R. § 68.3. At least for purposes of the FCC's access charge rules, a call "terminates" at the demarcation point. 47 C.F.R. § 69.2(cc).

¹⁷ DOC Complaint at ¶¶ 12-22.

Vonage's service does not meet the second tentative criterion the FCC set forth for phone-to-phone IP telephony. Second, as explained above, because Vonage's service performs a net protocol conversion end-to-end, it does not meet the fourth tentative FCC criterion. Moreover, the FCC refused to declare categorically that every service that met its four criteria would necessarily be a telecommunications service, concluding that "[w]e do not believe ... that it is appropriate to make any definitive pronouncements in the absence of a more complete record focused on individual service offerings. Again, this FCC refusal to classify phone-to-phone IP telephony as a telecommunications service weighs against the Commission determining, with respect to this novel question of law, that Vonage's service is a "telephone service" under Minnesota statutes.

Finally, the Commission should note that an unduly broad definition of "telephone service" would undoubtedly sweep into regulation entities that are far afield from the legislature's intent, as construed in *Minnesota Microwave*. Minnesota customers have available to them any number of services that transmit two-way communications (including voice communications) by means other than by "telephone," and these services are not regulated. For example, AOL's Instant Messenger service transmits two-way communications instantaneously in the form of text messages, and can also transmit voice messages over user-supplied hardware (the AIM Talk feature). Further, AOL has recently announced that in version AOL 9.0, subscribers will be able

See DOC Complaint at ¶ 12. Vonage notes that in paraphrasing the FCC criteria, the DOC misrepresented those criteria. The second prong of the FCC's four-part test does not rest on the similarity of CPE, but rather rests on the fact that the customer is not required "to use CPE different from that CPE necessary to place an ordinary touch-tone call." Federal-State Joint Board on Universal Service, Report to Congress, 13 FCC Rcd. 11501, ¶ 88 (1998) ("Report to Congress").

Again, by paraphrasing the *Report to Congress*, the DOC misrepresents footnote 188. That footnote states that "Routing and protocol conversion within the network does not change this conclusion, because from the user's standpoint there is no net change in form or content." (Emphasis added.) The FCC made no generic finding, as the DOC implies, that all phone-to-phone IP telephony transmits customer information without a net change in form.

²⁰ Report to Congress at ¶ 90.

to attach a phone to their computer and make telephone calls through AOL IM service.²¹ Microsoft's XBOX LiveTM service allows customers to play video games against each other over the Internet, and, with a provided Communicator headset, also allows them to talk to each other while playing. These are just two of the most prominent service providers, but many other examples exist of voice communications services that are not transmitted by telephone. As the Court cautioned in *Minnesota Microwave*, the statute should not be interpreted so broadly as to regulate businesses that do not threaten "the usual monopolistic evils." 190 N.W.2d at 667.

For all these reasons, the Commission should find that the term "telephone service" does not encompass Vonage's service, and dismiss the DOC's Complaint.

The Department Has Failed to State a Claim Upon Which Relief Could Be Granted

In two different respects, the DOC fails to state a claim upon which relief could be granted. First, the DOC does not plead facts sufficient to show that the Commission has personal jurisdiction over Vonage. The DOC makes no allegations that Vonage is a Minnesota corporation or a foreign corporation authorized to do business in Minnesota. Nor does the DOC allege that Vonage has established offices or other property in Minnesota. While the DOC refers generally to Vonage services used by Minnesota customers, it does not plead facts sufficient to show that Vonage itself has actively and purposefully marketed its service in Minnesota. Therefore, the DOC has failed to state a claim upon which the Commission could obtain the jurisdiction over Vonage necessary to grant the DOC's requested relief.

Second, the DOC has failed to plead facts necessary to define "telephone service" and to show that Vonage's service meets the statutory definition of "telephone service." In this regard, the DOC assumes that if Vonage's service looks like traditional telephone service provided by regulated entities in Minnesota, then Vonage's service must be subject to Commission regulation. The DOC never sets forth a definition of telephone service. Because it never sets forth this definition, it never shows that Vonage's service meets that definition. As explained above,

²¹ See Catherine Yang, AOL: Scrambling to Halt the Exodus, BUS.WK., Aug. 4, 2003.

Vonage's service does not meet the statutory definition of a telephone service. However, because the DOC has failed to plead the elements of a telephone service, the Commission need not even reach the question of whether Vonage's service is a telephone service. The Commission should dismiss the DOC's Complaint for failure to plead the necessary elements of its claim that Vonage's service is a telephone service.

Conclusion

Because DigitalVoiceTM performs a net protocol conversion and Vonage does not provide facilities to its customers, DigitalVoiceTM is not a "telephone service" subject to the Commission's jurisdiction. At a minimum, the question of whether VoIP services are "telephone services" under Minnesota law is a novel question that has not been addressed in Minnesota and should not be addressed for the first time in a complaint proceeding.

Dated: July 30, 2003.

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Exhibit 6

Memorandum in Support of Vonage Holdings Corp.'s Motion for Preliminary Injunction, File No. 03-5287MJD/JGL (filed Sept. 24, 2003)

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MINNESOTA

VONAGE HOLDINGS CORPORATION,)		
Plaintiff,	<i>)</i>)		
v.))		
THE MINNESOTA PUBLIC UTILITIES COMMISSION and, LEROY KOPPENDRAYER, GREGORY SCOTT, PHYLLIS REHA, AND R. MARSHALL JOHNSON, in their official capacities as the Commissioners of the Minnesota Public Utilities Commission and not as individuals,))))	File Number:	03-5287 MJD/JGL
Defendants.)))		

MEMORANDUM IN SUPPORT OF VONAGE HOLDINGS CORPORATION'S MOTION FOR PRELIMINARY INJUNCTION

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Plaintiff Vonage Holdings Corporation ("Vonage") respectfully submits this memorandum in support of its motion for a preliminary injunction barring the Minnesota Public Utility Commission ("PUC") from enforcing its order that imposes regulatory requirements on Vonage as if it were an ordinary telephone company.

INTRODUCTION

Vonage provides a service that permits voice communication over the Internet, and enables customers with high-speed Internet connections to talk with each other, and with ordinary telephone users, over the Internet. The PUC's Order, nonetheless, seeks to improperly regulate Vonage as if it were a local telephone company, even though Vonage, as an Internet service, is exempt from such regulation. Further, the Order imposes requirements that the PUC knows Vonage cannot satisfy. As a result, Vonage will have to cease providing its Internet service in Minnesota, while its competitors, who are not subject to the Order, will have free rein to take over Vonage's customers.

Vonage respectfully submits that it is entitled to preliminary injunctive relief.

First, Vonage is likely to prevail on the merits. The Telecommunications Act of 1996 ("1996 Act") mandates that the Internet remain "unfettered by Federal or State regulation." 47 U.S.C. § 230(b)(2). In seeking to extend its regulatory turf to the Internet, the PUC utterly disregarded this Congressional mandate. Further, because the PUC Order would not only shut down Vonage's service in Minnesota, but would effect operations elsewhere, it has an

Order Finding Jurisdiction and Requiring Compliance, In the Matter of the Complaint of the Minnesota Department of Commerce against Vonage Holding Corp Regarding Lack of Authority to Operate in Minnesota, Docket No. P-6214/C-03-108 (Minn. PUC Sept. 11, 2003) at 2 ("PUC Order" or "Order") (attached as Exhibit E to the Declaration of John Rego ("Rego Decl.")).

impermissible impact on interstate commerce in violation of the Commerce Clause of the U.S. Constitution.

In the proceeding below, the PUC ignored, or did not entertain, these arguments, and did not even provide Vonage with notice that it was considering a vote to regulate Vonage. For these reasons, the PUC failed to accord Vonage the procedural due process protections guaranteed by the Fifth and Fourteenth Amendments of the Constitution.

Second, the disruption to Vonage's business, the harm to its good-will and business advantage, constitutes irreparable harm under applicable Eighth Circuit standards.

Finally, the balance of harms and public interest considerations favor Vonage. Staying the Order and maintaining the *status quo* pending a decision on the merits would not harm any party. Permitting the PUC's Order to take effect, on the other hand, would drive Vonage out of the Minnesota market and deprive Minnesota consumers of Vonage's innovative, low-cost service.

For these and the other reasons discussed below, Vonage requests that the Court issue a preliminary injunction to preserve the status quo. The Court could, thereafter, address the merits of Vonage's claims, or refer the matter to the FCC. Vonage has filed a Petition with the FCC to invalidate the PUC Order, and the Court's referral could be consolidated with that proceeding.

See Rego Decl. ¶ 21 and Exh. F.

BACKGROUND

Vonage's Service. Vonage's DigitalVoice™ service is an innovative Internet offering that, like e-mail, instant messaging, Internet conferencing, and other as yet undreamed-of services, permits customers to communicate over the Internet. Unlike traditional telephone service, Vonage customers are not connected to the Public Switched Telephone Network

("PSTN") operated by local telephone companies, such as Qwest, the incumbent local exchange carrier ("LEC") in Minnesota. See Rego Decl. ¶ 3.

Rather, Vonage customers can only access the service over the high-speed Internet connections (also known as "broadband") provided by third-party cable modem, DSL, satellite, and other Internet Service Providers ("ISPs"). Vonage customers must install special computer equipment that permits them to place and receive communications over these broadband connections. This equipment, which is not proprietary to Vonage, can be configured in many different ways. Two possible configurations are represented in diagram below:

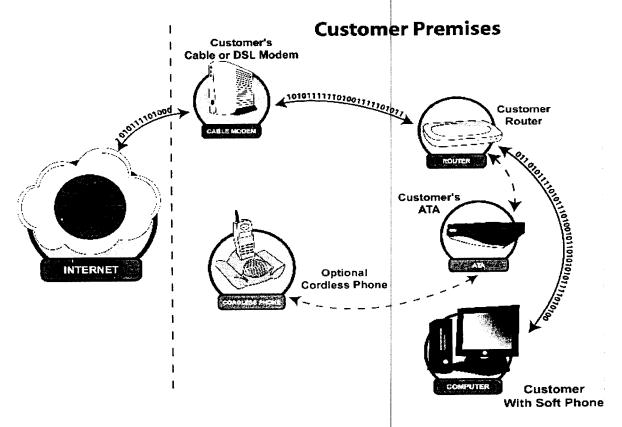


Figure: Typical Vonage Configurations

In the first configuration, the customer has purchased and installed a router (which is plugged directly into the Internet access modem provided by the ISP), and a special-purpose computer (the device labeled "ATA") that converts the Vonage customer's analog voice signals

into Internet Protocol ("IP") packets, and vice versa. Although a Vonage customer can attach conventional telephone handsets, a customer can just as easily use the speakers and microphones installed in their home computers (demonstrated by the second configuration labeled, "Customer with Soft Phone," in which special software is loaded onto a customer's personal computer). In either case, these devices *cannot* be used to access Vonage's service directly. A computer device, either the ATA or the customer's home computer (specially configured), must be installed and connected to the Internet. Rego Decl. ¶¶ 3-4.

All Vonage signals leave and enter the customer's premises in IP format and are routed over the third-party ISP's broadband Internet connection, and thereafter over the public Internet to one of Vonage's Internet servers, located around the country. The Internet data packets that comprise Vonage transmissions are indistinguishable from other Internet traffic, such as those carrying e-mail, chat, instant messaging, or communications to and from servers on the World Wide Web. Rego Decl. ¶ 6.

Vonage customers can communicate with each other over the Internet (just like e-mail or instant messaging), as many do, or with plain old telephone service ("POTS") users on the PSTN. Rego Decl. ¶ 7. It is the latter that has caught the PUC's attention, as even the PUC would presumably concede that it has no jurisdiction over the former. The routing of traffic from the Internet to the PSTN, and vice versa, is accomplished in a two-step process: first (for the out-bound transmission path from a Vonage customer to a POTS phone), the IP data packets associated with the customer's conversation are routed over the Internet to one of Vonage's servers, where they are then handed to a special computer that transforms the IP data packets into the format (also known as "protocol") of the PSTN. Vonage then hands the call off to a long-distance carrier (a regulated telephone company), that establishes the connection between

Vonage's Internet servers and the end-user's telephone on the PSTN. This process works in both directions, for in-bound and out-bound traffic. Rego Decl. § 8.

Vonage also makes it possible for users on the PSTN to dial ordinary 10-digit telephone numbers and "call" Vonage customers on the Internet. Because PSTN users can not dial an Internet IP addresses on the Internet, however, Vonage obtains telephone numbers from regulated telephone companies, just like any large corporation or end-user. But rather than being associated with a physical, geographic address on the PSTN, these numbers are associated with computers on the Internet. The PSTN number is assigned to a suitably-equipped computer, thereby allowing a PSTN user to communicate with a Vonage user anywhere on the Internet. And because the equipment is as portable as a laptop computer, the Vonage customer can use the service to place and receive calls from anywhere in the world. Vonage cannot determine the geographic location of its customers on the Internet. Rego Decl. ¶ 9.

Federal Regulation. A key dichotomy at the heart of federal communications law in general and this case in particular is the distinction between telecommunications and information services. Simply put, "telecommunications services" involve the transmission of information without alteration, while "information services" involve both the manipulation and transmission of information. Thus, for example, the local and long-distance voice telephone services offered by LECs such as Qwest are telecommunications services, but ISP services, such as America Online, or database services such as LEXIS and Westlaw, that use telecommunications networks

In a recent article in *PC Magazine*, one Vonage customer describes how he used Vonage's service with a California telephone number while staying at a hotel in New York City. John C. Dvorak, "Free Phone Calls," *PC Magazine*, July 2003. This flexibility is reflected in Vonage's Minnesota customer base. Of its approximately 500 customers with Minnesota billing addresses, 37 do not use a Minnesota telephone number. Vonage also has 88 other customers who use Minnesota telephone numbers but have non-Minnesota billing addresses. Rego Decl. ¶ 10.

to provide value-added services to customers, are information services. As their statutory definitions make clear, "information services" are provided via "telecommunications," and utilize the "telecommunications services" offered by "telecommunications carriers."

Telecommunications carriers are subject to common carrier regulation under Title II of the Communications Act. Common carrier status, under both state and federal law, imposes "broad standards of conduct, requiring the provision of service upon reasonable request, pursuant to charges and practices which are just and reasonable and not unjustly discriminatory." *Petition for Forbearance*, Memorandum Opinion and Notice of Proposed Rulemaking, 13 F.C.C.R. 16857, ¶ 15 (1998). Common carriers are also subject to numerous specialized requirements, including the filing of tariffs, contribution to universal service funds, and, E911 emergency services obligations.

Information services, on the other hand, are specifically exempt from common carrier regulation. See, e.g., 47 C.F.R. § 64.702(a) (2002) ("Enhanced services are not regulated under Title II of the Act"). Indeed, noting the competitiveness of the information services industry, and the benefits that accrue to U.S. consumers as a consequence, the FCC has deliberately chosen to impose as few regulatory obligations on information services as possible. See Second Computer Inquiry, Final Decision ("Computer II"), 77 F.C.C.2d 384 (1980), ¶ 123 ("to subject enhanced")

^{3 &}quot;The term telecommunications means the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." 47 U.S.C. § 153(43). A "telecommunications service" is "the offering of telecommunications for a fee directly to the public" 47 U.S.C. § 153(46). Likewise, a "telecommunications carrier' means any provider of telecommunications services" 47 U.S.C. § 153(44). "The term 'information service' means the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications" 47 U.S.C. § 153(20). Prior to the codification of these definitions in the 1996 Act, telecommunications services were known as "basic services;" information services were called "enhanced services." Federal-State Joint

services to a common carrier scheme of regulation ... would negate the dynamics of ... this area"). The FCC has classified Internet access and related services as information services.

Universal Service Report ¶ 73.

To prevent the states from establishing regulations that would conflict with these federal deregulatory policies, the FCC has limited the states' authority to regulate information services. In the *Computer II* proceedings, for example, the FCC "f[ou]nd that the enhanced services under consideration in this proceeding ... fall within the subject matter of this Commission," 77 F.C.C.2d, ¶ 125, and expressly "preempted the states [from] ... impos[ing] common carrier tariff regulation on a carrier's provision of enhanced services," *Computer II Further Reconsideration Order*, 88 F.C.C.2d 512, ¶ 83 n.34 (1981). The U.S. Court of Appeals for the D.C. Circuit upheld this exercise of preemptive authority, explaining that "[f]or the federal program of deregulation to work, state regulation of CPE [customer premises equipment] and enhanced services ha[ve] to be circumscribed." *Computer & Communications Indus. Ass'n v. FCC*, 693 F.2d 198, 206 (D.C. Cir. 1982). Accordingly, the court held that "state regulatory power must yield to the federal." *Id.* at 216.

Subsequent FCC orders have recognized that state regulation of information services, if not pre-empted, would interfere with federal deregulatory policies. *See Computer III Remand Proceedings Order*, 6 F.C.C.R. 7571, ¶ 121 (1991). These rules have likewise been affirmed by the courts. *California v. FCC*, 39 F.3d 919, 933 (9th Cir. 1994) (finding that in the FCC's order preempting state regulation of information services, the FCC had met its burden of showing that its "regulatory goals ... would be negated" by conflicting state regulation).

Board on Universal Service, Report to Congress, 13 F.C.C.R. 11501, ¶ 45 (1998) ("Universal Service Report").

The 1996 Act codified these long-standing FCC policies, and officially endorsed the FCC's policy of exempting information services and, by extension, the Internet from unnecessary regulation. Specifically, Congress found that "[t]he Internet and other interactive computer services have flourished, to the benefit of all Americans, with a minimum of government regulation." 47 U.S.C. § 230(a)(4). In order "to promote th[is] continued development," the 1996 Act reaffirmed the "policy of the United States" of maintaining the Internet "unfettered by Federal or State regulation." 47 U.S.C. § 230(b).

The PUC Proceedings. In December, 2002, shortly after Vonage began advertising the availability of service to Minnesota residents, the Minnesota Department of Commerce ("DOC") began an investigation of Vonage's service. Rego Decl. ¶ 12. After a seven month investigation (in which Vonage cooperated fully), on July 15, 2003, the DOC filed a complaint (the "Complaint") against Vonage before the Minnesota Public Utilities Commission ("PUC"), alleging that Vonage was providing telephone service in Minnesota without the authorization required therefor under State law. See Rego Decl. ¶ 12 and Exh. A. In the Complaint, the DOC requested "interim relief" in the form of an order directing Vonage to stop soliciting new customers and to file a 911 emergency services plan in advance of a hearing on the merits of the Complaint. Vonage filed an opposition to the request for interim relief on July 22, 2003. *Id*.

On July 24, 2003, the PUC voted to deny the DOC's request for temporary relief, and issued its Order Denying Temporary Relief on August 1, 2003.⁴ Rego Decl. ¶ 13 and Exh. B. Among other things, the PUC found that it was "unable to conclude, based on the present record, that the DOC is likely to succeed on the merits of its claim that temporary relief is necessary to

⁴ Order Denying Temporary Relief, In the Matter of the Complaint of the Minnesota Department of Commerce against Vonage Holding Corp Regarding Lack of Authority to Operate in Minnesota, Docket No. P-6214/C-03-108 (Minn. PUC Aug. 1, 2003) (Rego Decl., Exh. B).

protect the public's interest ... or that the relief sought is technically feasible." Order Denying Temporary Relief at 4. Indeed, the PUC admitted that it was "unable and unwilling to make any conclusions regarding [its] jurisdiction" over Vonage's service—e.g., whether Vonage offers a telecommunications service potentially subject to regulation or an Internet information service—"without further record development." *Id.* Finally, the PUC recognized that Vonage's service did not constitute an imminent threat to public safety, and was persuaded by Vonage's representations that it would work with the state's public safety officials to develop an acceptable 911 service. *Id.*

Subsequently, Vonage answered and moved to dismiss the complaint, and six additional parties moved to intervene or otherwise participate in the proceeding. Rego Decl. ¶ 14. The PUC then issued two separate, non-conflicting procedural notices scheduling the August 13 agenda meeting to again take up the issues presented in the DOC's Complaint. *Id.* (and Exhibits C and D thereto). These notices addressed purely procedural matters, and did not indicate that the PUC was prepared to address the merits of the DOC's Complaint. *Id.* Relying on the PUC's procedural notices and its Order Denying Relief stating that additional fact finding was necessary, Vonage's representative arrived at the hearing prepared to discuss the future conduct of proceedings only, but was surprised when the PUC's decided to take a vote on the merits of the DOC's Complaint. Rego Decl. ¶¶ 14-15.

On September 11, 2003, the PUC issued its Order finding that Vonage provides "telephone service" within the meaning of Minnesota law and that Vonage must "fully comply with all Minnesota Statutes and Rules relating to the offering of telephone service in Minnesota within 30 days of this Order" – *i.e.*, by October 11, 2003. The PUC declined to accept briefing or consider evidence on whether Vonage is properly treated as an information service provider

under Federal law and whether federal law precludes the imposition of state telephone regulation.

ARGUMENT

The Eighth Circuit's decision in *Dataphase Sys., Inc.* v. CL Sys., Inc., 640 F.2d 109, 113 (8th Cir. 1981) adopted the well known four-part test governing preliminary injunctions. Under *Dataphase*, a preliminary injunction should issue if the moving party can demonstrate: (1) that the movant will suffer irreparable harm absent the preliminary injunction; (2) a likelihood of success on the merits; (3) that the balance of harms favors the movant; and (4) that the public interest favors the movant. See also Heartland Academy Crity. Church v. Waddle, 335 F.3d 684, 690 (8th Cir. 2003).

I. Vonage Is Likely to Succeed on the Merits.

Beginning with the second *Dataphase* factor, the PUC's Order is constitutionally deficient for three separate reasons. First, the PUC's Order is preempted by the Communications Act of 1934, as amended, 47 U.S.C. § 151, *et seq.* (the "Act"), and the FCC's various orders implementing the Act's requirements. Second, the PUC's Order imposes an unconstitutional burden on interstate commerce. And third, the PUC violated the procedural due process guaranteed by the Constitution.

A. The PUC Order is Preempted by the Communications Act.

The Supremacy Clause of Article VI of the Constitution empowers Congress to preempt state law. Cipollone v. Liggett Group, Inc., 505 U.S. 504, 516 (1992). Congress can displace state law through (1) express preemption, (2) field preemption, or (3) conflict preemption. See Louisiana Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 368-69 (1986). Preemption may also

result when a federal agency, acting within the scope of its congressionally delegated authority, preempts state regulation. *Id.* at 369.

The PUC's Order conflicts directly with the Act, as interpreted and implemented by the FCC, and is therefore preempted. First, and most fundamentally, the PUC's Order imposes telephone common carrier regulation on Vonage's information service / Internet application.

The FCC, in its implementation of both the Act and the 1996 amendments to it, has determined that information services should be exempt from such regulation. Second, even if, *arguendo*, Vonage's service could be characterized as a telecommunications service (which it cannot), the PUC Order would still be preempted because Vonage's services are interstate in nature.

Congress has expressly preempted the field of interstate telecommunications, leaving no room for conflicting state regulation in this area.

1. The PUC's Order Constitutes Impermissible Regulation of Information Services and the Internet.

The Minnesota PUC committed a fundamental error when it treated Vonage's service as a telecommunications service subject to telephone regulation under Minnesota law. The PUC found that "the consumer is being provided with service that is functionally the same as any other telephone service." PUC Order at 8. While this "quacks-like-a-duck" style of legal reasoning may have some superficial appeal, it has already been soundly rejected by the FCC.

The FCC has recognized that "there may be telecommunications services that can be provisioned through the Internet," but nonetheless exempted Internet service and application providers from common carriage regulation like that imposed by the PUC. *Universal Service Report* ¶ 101. The FCC specifically found that the 1996 Act mandated that it continue "[l]imiting carrier regulation to those companies that provide the underlying transport," in order to "ensure[] that regulation is minimized and is targeted to markets where full competition has

not emerged." *Id.* ¶ 95. "We believe that Congress, by distinguishing 'telecommunications service' from 'information service,' and by stating a policy goal of preventing the Internet from being fettered by state or federal regulation, endorsed this general approach." *Id.*

The FCC clearly intended to prevent State orders such as the PUC's when it classified the Internet as an information service. The FCC recognized that if Internet service could be considered a telecommunications service, then States might be, "encourage[d] ... to impose common-carrier regulation on such providers." *Id.* ¶ 48. The "information service" classification precluded that potentially harmful result because it prevented the imposition of disparate "State requirements for telecommunications carriers [that] vary from jurisdiction to jurisdiction ... includ[ing] certification, tariff filing, and various reporting requirements and fees." *Id.* If such State regulations were permitted, the FCC found, the "result would inhibit growth of these procompetitive services, to the detriment of consumers in the United States and abroad." *Id.* The FCC's interpretation of the 1996 Act is, of course, subject to deference under the Supreme Court's *Chevron* doctrine. *See, e.g., Food and Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120 (2000).

a. Vonage Provides an Information Service.

Vonage's service satisfies the FCC's definition of an information service. The FCC has defined unregulated "enhanced services" as "services, offered over common carrier transmission facilities used in interstate communications, which employ computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information" 47 C.F.R. § 64.702(a) (2002). Vonage's service "act[s] on ... the format ... code [and] protocol ... of the subscriber's transmitted information" – that is, it converts transmissions originated in the asynchronous IP format of the Internet into the synchronous format used on the PSTN, and provides an interface between these otherwise incompatible

networks. The FCC has specifically held that a net protocol conversion service, like that provided by Vonage is a principle hallmark of an information service.⁵

Like all information services, Vonage's VoIP service uses telecommunications to deliver information to its users, but Vonage does not provide telecommunications. As the FCC cautioned, "it would be incorrect to conclude that Internet access providers offer subscribers separate services ... that should be deemed to have separate legal status, so that, for example, we might deem electronic mail to be a 'telecommunications service,' and Web hosting to be an 'information service.'" Universal Service Report ¶ 79. Indeed, the FCC has repeatedly emphasized that the two regulatory classifications describe mutually exclusive categories of service. See, e.g., id. ¶ 39. Thus,

[t]he service that Internet access providers offer to members of the public is Internet access. That service gives users a variety of advanced capabilities. Users can exploit those capabilities through applications they install on their own computers. The Internet service provider often will not know which applications a user has installed or is using. Subscribers are able to run those applications, nonetheless, precisely because of the enhanced functionality that Internet access service gives them.⁶

Cable modem service is not itself and does not include an offering of telecommunications service to subscribers. We disagree with commenters that urge us to find a telecommunications service inherent in the provision of cable modem service. Consistent with the statutory definition of information service, cable modem service provides the capabilities described above "via

⁵ Services that result in no net protocol conversion to the end user continue to be classified as basic services. Communications Protocols under Section 64.702 of the Commission's Rules and Regulations, Memorandum Opinion, Order, and Statement of Principles, 95 F.C.C.2d 584, 596 (1983) ("Communications Protocols Decision"). The net conversion test examines the service on an end-to-end basis from the demarcation point at the premises of the originating caller to the demarcation point where the call will be terminated.

⁶ This determination is in accord with the FCC's finding 20 years ago that basic and enhanced services could be similar: "[W]e recognize that some enhanced services may do some of the same things that regulated communications services did in the past. On the other side, however, is the substantial data processing component in all these services." Computer II, ¶ 132 (emphasis added). The FCC reiterated the point in its recent order finding that cable modem service Internet access service is information services:

The FCC's description of "applications" that end users can "install on their own computers" to "exploit" the advanced "capabilities" of Internet access services describes

Vonage's service exactly. As discussed, Vonage's service is only available to Internet users who already receive broadband ISP service, such as DSL or cable modem service. Vonage does not provide the Internet connection and is not an ISP itself. Moreover the "host" ISP whose customers access Vonage over its facilities should be no more aware of that fact than it is aware of any other web browsing done by its customers.

Finally, the FCC has already found that Internet based IP telephony providers, such as Vonage, "do[] not appear to be providing telecommunications services to [their] subscribers."

Universal Service Report ¶ 87. The Commission summarized its analysis of the regulatory classification that should be assigned to IP telephony providers by crafting a four-part test for determining when IP telephony services may be classified as telecommunications services, rather than information services. Telecommunications services, it found, are characterized by the following: (1) the provider holds itself out as providing voice telephony or facsimile transmission service; (2) the provider does not require the customer to use CPE different from that CPE necessary to place an ordinary touch-tone call (or facsimile transmission) over the public switched telephone network; (3) the provider allows the customer to call telephone numbers assigned in accordance with the North American Numbering Plan, and associated

telecommunications." That telecommunications component is not, however, separable from the data-processing capabilities of the service. As provided to the end user the telecommunications is part and parcel of cable modem service and is integral to its other capabilities.

Declaratory Ruling and Notice of Proposed Rulemaking, *Inquiry Concerning High-speed Access to the Internet Over Cable and Other Facilities*, 17 F.C.C.R. 4798, ¶ 39 (2002).

international agreements; and (4) the provider transmits customer information without net change in form or content. *Id.* at ¶ 88.

Although Vonage's service satisfies the first and third of these criteria (Vonage customers can use the service as an alternative to placing conventional telephone calls, and can place calls to ordinary telephone numbers), it unequivocally does *not* satisfy the other two elements.⁷ Consumers must install special CPE (*i.e.*, computer equipment), and the transmission *does* involve a net protocol conversion – from the IP format of the Internet to the format of the PSTN. The Minnesota PUC simply overlooked, or misunderstood, these aspects of Vonage's service.

b. The PUC Order Conflicts with the Federal Deregulatory Scheme.

The Minnesota PUC Order requiring Vonage to submit to regulation of its services as if it were an intrastate common carrier conflicts with Federal rules promoting unregulated competition in information services. Even assuming arguendo that Vonage's service has a separately identifiable "purely intrastate" component when offered over the Internet, State imposition of common carrier regulation would be inconsistent with the express Congressional policy that the Internet should be free from Federal and State regulation, see, e.g., 47 U.S.C. § 230 (emphasis added), and with the FCC's findings that the public interest will be best served by innovation and unfettered competition in the offering of information services. In the Computer II proceeding, the Commission expressly found that "the provision of enhanced services is not a

⁷ The PUC may have confused Vonage's service with what the FCC called "phone-to-phone IP telephony," which the FCC described as calls originated over a "handset connected to the public switched network" that are terminated "to ... [an] ordinary telephone at the receiving end." *Universal Service Report* at ¶ 84. Although such phone-to-phone calls may be routed over an IP network – even over the public Internet – the FCC stated that they may "lack[] the characteristics that would render them 'information services' within the meaning of the statute." *Id.* at ¶ 89. Vonage does not provide phone-to-phone IP telephony.

common carrier public utility offering and that efficient utilization and full exploitation of the interstate telecommunications network would best be achieved if these services are free from public utility-type regulation." Computer II Further Consideration Order, 88 F.C.C.2d 512, ¶ 83, n.34 (1981). States are, therefore, prohibited from "impos[ing] common carrier tariff regulation on a carrier's provision of enhanced services." Id

Here, it cannot be disputed that State regulation of services offered over the Internet has the potential to prevent "efficient utilization and full exploitation of the interstate telecommunications network" over which Internet traffic passes. The Internet is the "international computer network of both Federal and non-Federal interoperable packet switched data networks." 47 U.S.C. § 230(f)(1). If Vonage is prohibited from offering DigitalVoice service in Minnesota, Internet access customers in Minnesota will not be able to use the same wide range of Internet applications available to their counterparts in other states. Rego Decl.

¶ 17. This will affect their usage of, and subscription to, the Internet itself, which the FCC has already found to be an inherently interstate information service. If one State decides to regulate instant messaging, and another regulates e-mail, the Internet as a whole will become less valuable to customers in other States (and countries) because they will no longer be able to exchange data with any other user. Therefore, State regulation of services offered over the Internet necessarily interferes with interstate use of the Internet and with the Federal policy of promoting such use.

Accordingly, the PUC's attempt to impose telephone common carrier regulation upon Vonage conflicts with the well established federal policy exempting such services from common carrier regulation. As one federal district court has observed, no "federal or state court has applied common carrier regulation ... to an information service provider." *America Online, Inc.*

v. GreatDeals.Net, 49 F.Supp.2d 851, 856-57 (E.D. Va. 1999). The GreatDeals court refused to "be the first to do so, especially in the face of contrary direction by Congress and the FCC." Id. at 857.

2. The MN PUC is Preempted from Regulating Interstate Telecommunications.

As explained above, the law is clear that Vonage provides an information service, not a telecommunications service. The PUC erred in concluding otherwise. But even if this Court accepted the PUC's determination that Vonage provides telephone service, the PUC would still be preempted from regulating Vonage because Vonage clearly provides an *interstate* service, over which the states have no regulatory authority.

The Communications Act of 1934 establishes "a system of dual state and federal regulation over telephone service." *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 360 (1986). Although states retain authority over certain purely intra-state matters, "questions concerning the duties, charges and liabilities of telegraph or telephone companies with respect to *interstate* communications service are to be governed solely by federal law and [] the states are precluded from acting in this area." *Ivy Broadcasting Co. v. Am. Tel. & Tel. Co.*, 391 F.2d 486, 491 (2d Cir. 1968) (emphasis added); *see also NARUC v. FCC*, 746 F.2d 1492, 1498 (D.C. Cir. 1984) ("Interstate communications are totally entrusted to the FCC"). The dividing line between the regulatory jurisdictions of the FCC and states depends on "the nature of the communications which pass through the facilities and not on the physical location of the lines."

Other courts have held likewise. See, e.g., Howard v. America Online, Inc., 208 F.3d 741, 753 (9th Cir. 2000) (refusing to impose common carrier obligations on ISP); CompuServe, Inc. v. Cyber Promotions, Inc., 962 F.Supp. 1015, 1025 (S.D. Ohio 1997) ("[ISPs] have been held not to be common carriers.") (citing Religious Tech. Ctr. v. Netcom On-Line Communication Servs., Inc., 907 F.Supp. 1361, 1369 n. 12 (N.D. Cal. 1995) (holding, in copyright suit, that ISP was not a common carrier)).

Id. (quotation and citations omitted, punctuation altered). As the Supreme Court held in Louisiana, preemption can occur "where compliance with both federal and state law is in effect physically impossible[.]" Louisiana, 476 U.S. at 368. "Thus purely intrastate facilities and services used to complete even a single interstate call may become subject to FCC regulation to the extent of their interstate use." NARUC v. FCC, 746 F.2d at 1498.

Because of the nature of the Internet and Vonage's service, it is technically impossible to apply Minnesota's regulations, purportedly limited to intrastate "calls," without also affecting interstate components of Vonage's service. On traditional telephone networks, it is usually possible to determine the jurisdiction of traffic on a call-by-call basis, because the carrier (or, in the case of a reseller, the underlying facilities-based carrier) provides a physical connection to the end user, and therefore can determine where that user is located. The same is not true of Internet traffic. The Internet has no system for determining the geographic location of users, and, thus, Vonage has no accurate way of determining where a particular customer is located at the time the customer places a call. Vonage identifies the computer device the customer uses to access the service (so that it can verify that the user is indeed a customer), but since such devices can easily be plugged into any broadband Internet connection, Vonage does not know where the device and its user are located at any given time. Therefore, it is technically impossible for Vonage to determine whether any particular call on the Internet is intrastate or interstate in nature. Rego Decl. ¶16.

This means that the Minnesota PUC cannot enforce its Order with respect to Vonage's intrastate services without also interfering with Vonage's ability to provide at least some jurisdictionally interstate information services over interstate facilities. Federal law preempts State action that would affect interstate communications: "questions concerning the duties,

charges and liabilities of telegraph or telephone companies with respect to *interstate* communications service are to be governed solely by federal law and ... the states are precluded from acting in this area." Vonage is a customer of interstate communications carriers, whose services it uses for connections between its servers and users of the PSTN, and its use of those services falls within the exclusive jurisdiction of the FCC, not the PUC. ¹⁰

Significantly, there is no "proxy" or "rule of thumb" that the Minnesota PUC could apply that could reliably separate intrastate from interstate traffic completed over Vonage's service. For example, Vonage cannot assure compliance with the PUC Order by blocking all transmissions originating from and terminating to telephone numbers with Minnesota area codes, because that telephone number could belong to a customer located in another state (either temporarily or permanently); and, conversely, some Vonage customers located in Minnesota are likely to be using non-Minnesota telephone numbers. Similarly, Vonage cannot assure compliance with the PUC order by preventing its customers with Minnesota mailing addresses from placing calls to or receiving calls from Minnesota telephone numbers, because the Vonage customer might not actually be in Minnesota at the time of placing the call; and, conversely, this

⁹ Ivy Broadcasting Co. v. Am. Tel. & Tel. Co., 391 F 2d 486, 491 (2d Cir. 1968) (emphasis added). See also National Ass'n of Regulatory Util. Comm'rs v. FCC, supra (affirming rules precluding states from regulating WATS service because "interstate communications ... are placed explicitly within the sphere of federal jurisdiction by the plain language of the Communications Act").

¹⁰ The PUC's Order thus overlooks – indeed, makes no acknowledgement of – the fact that all Vonage transmissions terminated on the PSTN in Minnesota are handled by a long distance carrier that "picks up" the call out-of-state and pays interstate terminating access to the local exchange carrier, pursuant to federal tariff, to terminate the call in Minnesota. This hand-off occurs outside Minnesota, and is handled by an interexchange carrier subject to the exclusive jurisdiction of the FCC.

would not prevent customers from other states from using the service while visiting Minnesota. 11 Rego Decl. ¶ 17. Thus, Vonage has no way of guaranteeing that it is in compliance with the Order unless it blocks a substantial amount of interstate traffic as well.

Because Vonage cannot, as a practical matter, stop offering intrastate service in Minnesota without also affecting interstate services subject to the FCC's jurisdiction, the State may not regulate Vonage's service. The FCC has confronted this issue with respect to both telecommunications and information services, and has not hesitated to preempt State regulation where, as a practical matter, it is impossible to separate a jurisdictionally mixed service into interstate and intrastate components. For example, the Commission has asserted jurisdiction over dedicated private lines carrying jurisdictionally mixed traffic (except where the interstate use is *de minimis* (less than 10 percent)) because of the practical impossibility of measuring and billing separately for the portion of the line carrying intrastate traffic. *See MTS and WATS Market Structure*, 4 F.C.C.R. 5660, ¶ 6-9 & n.7 (1989); *see also Petition of New York Telephone Company*, 5 F.C.C.R. 1080 (1990). Similarly, when the Commission granted GTE's request to tariff the DSL Internet transport service sold to ISPs such as AOL, the Commission found that Internet access is interstate telecommunications. *See GTE Tel. Operating Cos. GTOC Transmittal No. 1148*, 13 F.C.C.R. 22466 (1998). The Commission acknowledged that some of

¹¹ As noted above, Vonage currently has 38 customers with Minnesota billing addresses who have requested non-Minnesota telephone numbers, and billing addresses who use Minnesota telephone numbers.

¹² See, e.g., Promotion of Competitive Networks in Local Telecommunications Markets, 15 F.C.C.R. 22983, ¶ 107 (2000) ("[b]ecause fixed wireless antennas are used in interstate and foreign communications and their use in such communications is inseverable from their intrastate use, regulation of such antennas that is reasonably necessary to advance the purposes of the Act falls within the Commission's authority"); Rules and Policies Regarding Calling Number Identification Service -- Caller ID, 10 F.C.C.R. 11700, ¶¶ 85-86 (1995) (California default line-blocking policy was preempted because it would preclude transmission of Caller ID numbers on interstate calls, and effect of the policy was inseverable).

the transmissions passing over an Internet access line may be intrastate in nature, but that the interstate component was not *de minimis*. *Id*. ¶¶ 22, 25.

The inseverability doctrine mandates preemption here. The Minnesota PUC Order requires Vonage to cease completing intrastate calls in Minnesota. Vonage has demonstrated that it is impossible to do this without also blocking a significant amount of interstate traffic. Indeed, since *any* Vonage customer could, in theory, travel to Minnesota at any time and connect their ATA to a broadband Internet connection, Vonage could never prevent *all* intrastate Minnesota use of its service unless it blocked *all* interstate calls as well.

B. The Order Impermissibly Burdens Interstate Commerce.

The Commerce Clause empowers Congress to regulate commerce among the states. It also confines the states' power to burden interstate commerce. *Oregon Waste Sys. v. Dep't of Envtl. Quality*, 511 U.S. 93, 98 (1994). The "dormant" Commerce Clause operates in this latter capacity by denying "the States the power unjustifiably to discriminate against or burden the interstate flow of articles of commerce." *Id.*; *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 392 (1994).

Under the Commerce Clause, State regulation is per se invalid when it has an "extraterritorial reach," that is, when the statute has the practical effect of controlling conduct beyond the boundaries of the State. See Healy v. Beer Inst., Inc., 491 U.S. 324, 336 (1989); Cotto Waxo Co. v. Williams, 46 F.3d 790, 793-95 (8th Cir. 1995). The Dormant Commerce Clause also requires the striking of a State's law if the burden it imposes upon interstate commerce is "clearly excessive in relation to the putative local benefits." See Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970); R&M Oil & Supply Inc. v. Saunders, 307 F.3d 731, 735 (8th Cir. 2002); U&I Sanitation v. City of Columbus, 205 F.3d 1063, 1067 (8th Cir. 2000).

First, the PUC Order plainly has an extraterritorial reach. Vonage could, for example, discontinue marketing its service in Minnesota altogether, and no longer offer service to endusers with Minnesota billing addresses, but still run afoul of the PUC's Order. As noted, the Vonage equipment and service is portable. Like remote e-mail, Vonage customers can access the service from anywhere with access to a high speed Internet connection. Thus, a customer with a Wisconsin billing address, operating his or her equipment in Minnesota, can place and receive "calls" that the PUC has deemed intrastate, and subject to the PUC's regulation. The Eighth Circuit has recognized that "a statute has extraterritorial reach when it necessarily requires out-of-state commerce to be conducted according to certain in-state terms." *Cotto Waxo*, 46 F.3d at 794. Here, the PUC Order not only "requires out-of-state commerce to be conducted according to certain in-state commerce to be conducted according to certain in-state terms." Thus, the PUC Order clearly has a constitutionally impermissible extraterritorial reach.

The PUC Order also has the practical effect of preventing Vonage from offering interstate services that originate or terminate in Minnesota. In theory, Vonage could continue to offer a service to Minnesota users that only allowed them to place and receive interstate call, but in reality there is absolutely no demand for a service that is so limited. No consumer can reasonably be expected to switch back and forth between using their computer to talk to people in other states, and an ordinary telephone to talk to those in the same state. Both the Fourth and Ninth Circuits have upheld FCC preemption of State rules in situations where, even though compliance with two inconsistent jurisdictional regulations was physically possible, it was practically impossible because it would effectively require consumers to maintain two sets of equipment at home for placing different types of calls. California v. FCC, 39 F.3d 919, 929-30 (9th Cir. 1994); North Carolina Utils. Comm'n v. FCC, 552 F.2d 1036, 1043 (4th Cir. 1977).

Finally, the burden the PUC Order imposes upon interstate commerce clearly exceeds its putative local benefits, and thus fails the *Pike* balancing test. In fact, the Order itself contains *no* policy rationale or explanation of the benefits that will accrue to Minnesota consumers as a result of the Order's issuance. It is further devoid of any explanation of how any such benefits would be significant compared to the harm to interstate commerce done by the Order. While the PUC's lawyers may advance some arguments in the course of this litigation, they should be seen for what they are: *post-hoc* rationalizations for an otherwise flawed order. ¹³

C. The PUC Order Violates Vonage's Due Process Rights.

The PUC's arbitrary decision violated Vonage's Fifth and Fourteenth Amendment due process rights. "Due process is a 'flexible concept that varies with the particular situation,' and its 'fundamental requirement ... is the opportunity to be heard at a meaningful time and in a meaningful manner." U.S. v. BP Amoco Oil PLC, 277 F.3d 1012, 1017-18 (8th Cir. 2002) (quoting Winegar v. Des Moines Ind. Community Sch. Dist., 20 F.3d 895, 899-900 (8th Cir. 1994)). The substantive inadequacy of the Commission's notice, coupled with the Commission's unannounced decision to resolve all disputed facts against Vonage, constitutes a due process violation.

Courts in the Eight Circuit employ a "two-step analysis" to evaluate due process claims. Krentz v. Robertson Fire Protection Dist., 228 F.3d 897, 902 (8th Cir. 2000). A party must first demonstrate that it has a constitutionally protected interest in life, liberty or property. *Id.* "[T]he

¹³ The absence of any justification in the text of the Order itself is almost certainly a product of the PUC's rush to judgment. See Section I.C, infra (discussing procedural due process violation). Had the PUC entertained briefing from Vonage, it would have at least seen Vonage's Commerce Clause arguments, and the Order, presumably, would have made some attempt to address those issues.

plaintiff must then establish that the state deprived him of that interest without sufficient 'process.'" Id.

1. Vonage Has a Protected Interest.

Vonage's property interest in the continued operation of its business – in Minnesota and elsewhere – cannot be disputed. "[P]roperty interests protected by procedural due process extend well beyond actual ownership of real estate, chattels, or money." *Bd. of Regents v. Roth*, 408 U.S. 564, 571-72 (1972). Cognizable property interests "stem from an independent source such as state law – rules or understandings that secure certain benefits and that support claims of entitlement to those benefits." *Id.* at 577; *Logan v. Zimmerman Brush Co.*, 455 U.S. 422 (1982). Due process rights vest when "matter[s] of statutory entitlement" are at issue. *Goldberg v. Kelly*, 397 U.S. 254, 262 (1970).

The interest at stake here is no less a statutory entitlement than the right to continued employment at issue in *Roth* or the right to receive welfare benefits addressed in *Goldberg*. The Minnesota courts have recognized, for example, a cognizable property in a business licenses. See Bird v. Dep't of Pub. Safety, 375 N.W.2d 36, 42 (Minn. Ct. App. 1985) (finding property interest in automobile dealer's license). The federal government has determined that Internet services should remain unregulated, and Vonage's business is predicated upon this unregulated status.

2. The PUC Notice Was Substantively Inadequate to Afford Vonage Due Process.

"The Due Process Clause of the Fourteenth Amendment requires that a State, prior to taking an action affecting an interest in property, provide notice that is reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of that action."

Kornblum v. St. Louis County, 72 F.3d 661, 663 (8th Cir. 1995). Notice sufficient to satisfy the

Due Process requirements must be "reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). "Further, the notice must 'apprise the affected individual of and permit adequate preparation for, an impending hearing." *Bliek v. Palmer*, 102 F.3d 1472, 1475 (8th Cir. 1997) (quoting *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1, 14 (1978)) (emphasis added).

Here, the totality of the circumstances surrounding the PUC proceedings demonstrates the inadequacy of the notice afforded Vonage. On August 1, 2003, the PUC denied the Department of Commerce's request for temporary relief. In doing so, the PUC stated that "without further record development the [PUC] is unable and unwilling to make any conclusions on jurisdiction. It follows that the [PUC] cannot conclude that the DOC is likely to succeed on the merits or meet the other statutory standards." Order Denying Temporary Relief at 4. The PUC determined the subsequent issues "will be addressed in the regular course of this complaint proceeding." *Id*.

Between the PUC's Order on August 1 and the hearing on August 13, no further material was added to the record. The PUC noticed the August 13 hearing in two different, but non-conflicting, statements. Originally, the PUC announced that it would entertain arguments regarding two questions – "(1) Does the Commission have jurisdiction over the matter?" and "(2) Does the complaint warrant an expedited or contested case proceeding?" Rego Decl., Exh. C. This original notice, addressing two purely procedural matters, did not and could not give any indication that a determination on the merits was forthcoming. On August 5, a mere 8 days

before the meeting,¹⁴ the PUC issued a revised notice to address the generic question: "How shall the Commission proceed?," thus providing additional indication that the PUC would address only procedural, not substantive issues. Given this procedural posture and the intervention of six parties who wished to participate, Vonage was, therefore, surprised when the PUC decided the case on its merits.

The PUC's scheduling orders were, at best, vague and ambiguous, and at worst, misleading. The PUC, therefore, failed to provide constitutionally adequate notice. "The concept of right to notice is that the right to be heard 'has little reality or worth unless one is informed that the matter is pending." Comm'r of Natural Resources v. Nicollet County Pub. Water/Wetlands Hearings Unit, 633 N.W.2d 25, 29 (Minn. Ct. App. 2001) (quoting Mullane, 339 U.S. at 314). The Commission's notice did not inform Vonage that a determination on the merits was forthcoming, and, thus, deprived Vonage of its property interests without affording it proper process. Bliek, 102 F.3d at 1472; Brandt v. Hickel, 427 F.2d 53 (9th Cir. 1970) (finding "ambiguous" notice of procedural rights constituted due process violation); Entergy, Arkansas Inc. v. Nebraska, 241 F.3d 979, 991 (8th Cir. 2001) (inadequate notice constituted "denial of fundamental procedural fairness").

3. Vonage Was Not Afforded a "Meaningful Opportunity to be Heard."

Vonage's due process rights include "a full opportunity to meet the charges" filed against it. Citizens State Bank v. FDIC, 751 F.2d 209, 213 (8th Cir. 1984). "In general, due process requires that a hearing ... be provided at a meaningful time, and in a meaningful manner."

Minnesota law itself requires 10 days notice to interested parties before a PUC hearing, unless "exigent circumstances" are found. Minn. R. 7829.2800. The PUC has never stated that "exigent circumstances" required the issuance of the revised notice.

Coleman v. Watt, 40 F.3d 255, 260 (8th Cir. 1994); Mathews v. Eldridge, 424 U.S. 319 (1976). The facts demonstrate that Vonage was not afforded such an opportunity.

Indeed, the Vonage proceedings are virtually indistinguishable from similar proceedings at issue in *New England Telephone and Telegraph Co. v. Conversent Communications*, 178 F.

Supp. 2d 81 (D.R.I. 2001). In *NETT*, the court considered a due process challenge to a State Commission hearing held to determine whether ISP-bound traffic constituted "local traffic" under an interconnection agreement. The State Commission ruled against Verizon in a summary proceeding, but the court concluded that the PUC ignored "contested facts ... [that were] material to the outcome of the case," including issues regarding federal jurisdiction over the matter. *Id.* at 93. The State Commission's failure to develop a more complete record constituted "clear error" and violated Verizon's due process rights. *Id.* at 94-95.

The facts at issue here compel a similar conclusion. Vonage's Answer to the PUC's Complaint identified numerous disputed material facts, any of which should have precluded a determination on the merits. Despite the PUC's stated intent to develop a more complete factual record, it ignored the contested and incomplete state of the record, refused to accept briefing on the legal issues in dispute, and proceeded to render a decision on the merits. As a result, the PUC deprived Vonage of "a full opportunity to meet the charges" and the PUC's Order violated Vonage's due process rights. *Citizens State Bank*, 751 F.2d at 213.

II. Vonage Will Suffer Irreparable Harm If the Order is Enforced.

The Order requires Vonage to apply for and receive regulatory authorization from the PUC to provide telecommunications local exchange services in the State within 30 days.

Vonage has no real prospect of obtaining that authorization, because (as the PUC knows) it cannot possibly comply with the State's emergency service requirements. 15

Though Vonage is not legally obligated to provide emergency calling services, it has voluntarily developed methods for allowing its customers to contact public safety answering points ("PSAPs") by dialing the familiar digits "911." Its service differs, however, from traditional 911. First, for the reasons explained above, and like mobile carriers, Vonage is not able to identify the actual geographic location of its customers at the time they place a call. Therefore, Vonage requires its customers to register their location (through a web page) before they can use 911 dialing, and routes calls to the PSAP serving the customer's registered location. If a customer travels to a different location and forgets to update their registration, their 911 call may be routed to the wrong PSAP. Vonage 911 calls are also routed to public safety operators differently from regular 911 traffic. Vonage's website clearly informs customers about the operation and limitations of its 911 dialing feature. Rego Decl. ¶ 11.

Even if it were possible to receive certification within 30 days, the Order, if implemented, would prohibit Vonage from providing service in Minnesota. As the FCC chief technical consultant has recognized, because of the mobile nature of the Internet and the impossibility of determining the geographic location of Internet users, VoIP providers such as Vonage cannot technically comply with existing E911 calling requirements applicable to LECs. ¹⁶ Indeed, the

¹⁵ Even aside from the issues described in the text, it would be practically impossible for any carrier to obtain regulatory authorization from the PUC within 30 days. To the best of Vonage's knowledge, the PUC has never granted any application for certification within 30 days of filing; normal applications take several times that to process. Thus, even in an (unrealistic) best-case scenario, the Order would require Vonage to suspend its Minnesota operations for several months, losing its existing customer base in the process.

¹⁶ Dale N. Hatfield, Technical Consultant to the FCC, A Report on Technical and Operational Issues Impacting the Provision of Wireless Enhanced 911 Services (October 15,

PUC has made it clear that Vonage should not even bother applying for State certification, because of what the PUC views as inadequacies with its 911 plan.¹⁷

It is, thus, a foregone conclusion that the PUC would deny Vonage's CLEC application, and that Vonage would have to stop serving its Minnesota customers, and stop signing up new customers immediately. Vonage is currently far and away the leader in this exciting business niche, but its head start over the rest of the industry could disappear in the blink of an eye, especially if it is required to shut down operations, even if only briefly.

This lost business, and the damage to the company's reputation and the good will it has earned from its customers, for which Vonage cannot be compensated, establishes irreparable harm. See, e.g., United Healthcare Ins. Co. v. AdvancePCS, 316 F.3d 737, 740-42 (8th Cir. 2002). It is also a black letter rule in the Eighth Circuit that when an alleged deprivation of a constitutional right is involved, no further showing of irreparable injury is necessary. See, e.g., Planned Parenthood v. Citizens for Cmty. Action, 558 F.2d 861, 867 (8th Cir. 1977).

Here, moreover, the existence of irreparable harm is especially clear, for the PUC's Order will preclude Vonage from doing business in Minnesota entirely if a preliminary injunction is not

²⁰⁰²⁾ at 41. (The report may be viewed on the FCC's web site. Visit: "http://www.fcc.gov/911/enhanced/reports/" and click on the link to the Hatfield Report.)

Pioneer Press, August 15, 2003 (quoting Diane Wells, assistant to Edward Garvey, Deputy Commissioner in charge of telecommunications, as saying that Vonage's system "would not meet local phone standards and if Vonage comes back with that kind of 911 plan [referring to Vonage's current 911 dialing solution], the Commerce Department will recommend it not be permitted to operate in Minnesota").

A state official responsible for reviewing 911 plans has likewise indicated that Vonage's application will be held to standards that everyone knows cannot be met. See Response and Corrections Offered by Nancy A. Pollock (stating that, "we are interested in seeing that Vonage comply with 911 requirements and that the Vonage customer's 911 call be processed through the native 911 network. . . . We did reiterate . . . that we are interested in the full features of enhanced 911 (ANI/ALI/SR) as required in the consolidated metro area 911 plan and MS 403").

entered. The Eighth Circuit has held that, even where there is a possible damages remedy, the economic losses that result from the exclusion of the claimant from a profitable business relationship are so difficult to estimate that irreparable harm is established. See Medicine Shoppe Int'l, Inc. v. S.B.S. Pill Dr., Inc., 336 F.3d 801, 805 (8th Cir 2003); see also Indep. Wireless One Corp. v. Town of Charlotte, 242 F. Supp. 2d 409, 417 (D. Vt. 2003) (under the Communications Act, where enforcement of an order would render a telecommunications company unable to compete, irreparable injury is established). The need for injunctive relief is especially compelling when the defendant is a state governmental entity that cannot be required to pay damages upon the final adjudication of Vonage's claims on the merits. Baker Elec. Coop., Inc. v. Chaske, 28 F.3d 1466, 1473 (8th Cir. 1994).

Finally, Vonage cannot guarantee complete compliance with the PUC's Order. As explained above, a Vonage customer from Wisconsin (or elsewhere) can take his or her equipment into Minnesota, plug it into a broadband Internet connection, and begin placing the very calls to Minnesota end-users that the PUC has deemed intra-state and attempted to regulate. In the meantime, however, the PUC's Order unreasonably exposes Vonage to fines and penalties before the Minnesota PUC. Vonage should not be exposed to such a potential hardship.

III. The Balance of Harms Favors a Preliminary Injunction.

The balance of harms clearly and decisively favors entry of a preliminary injunction.

Entry of a preliminary injunction would merely continue the status quo. Vonage has fewer than 500 customers with Minnesota billing addresses. And while Vonage might succeed in signing up additional customers in the presumably brief period that it would require this Court to rule on the lawfulness of the PUC Order, the PUC cannot realistically claim that Vonage's service poses a significant threat to the health and safety of Minnesota consumers, or to the public's interest in fair and reasonable competition. See Order Denying Temporary Relief at 4.

On the other hand, staying the Order and maintaining the status quo pending appeal would not cause harm to any party. The PUC, in denying the DOC's request for temporary relief, already determined that the public interest did not require immediate implementation of the measures proposed by the DOC. The length of the DOC's own investigation, which took more than six months, also supports the conclusion that Vonage's continued operation poses no immediate threat of harm, to Minnesota consumers or otherwise. Vonage has not held itself out to be a certificated telephone service provider, so delaying certification pending appeal cannot cause any harm. Any retroactive 911 fees owing can be paid immediately post-appeal, if the PUC's Order is upheld.

The only conceivable source of harm that arguably could flow from Vonage's continued operation in the state pending appeal is that associated with the limitations inherent in Vonage's 911 dialing solution. However, as the record below reflects. Vonage's customers are fully advised as to those limitations and accept them when they take Vonage's service. In the mean time, the emergency service that Vonage *does* provide free of charge is functionally equivalent to the 911 service provided by mobile phone carriers, who are also not currently subject to E911 calling requirements. As for the other harms cited by the DOC in its Complaint, such as Vonage's exemption from contribution requirements to various funds that telecommunications carriers must pay into, these amounts are *de minimis* and do not pose a serious threat to the solvency of these funds, especially given the short period of time that it will take to resolve merits of Vonage's claim.

By contrast, denial of a preliminary injunction would have devastating effects on Vonage.

As noted, it will cause Vonage to cease marketing and offering services to new customers.

Vonage will also be required to terminate service provided to existing customers. The enormous

and irreparable harm to Vonage far outweighs any benefit to the State and Minnesota consumers if the *status quo* is maintained pending this court's review.

IV. A Preliminary Injunction Will Serve the Public Interest.

It is readily apparent that the public interest favors preservation of the *status quo*. Consumers benefit from the low-cost, innovative services that Vonage offers. If an injunction is wrongfully entered, there is no risk of harm to the public pending the Court's ruling on the merits. The real risk is from wrongfully denying an injunction. Given that Vonage will be forced to exit the Minnesota communications market, and that its customers would be denied the benefit of Vonage's services, the public interest would be severely harmed by failure to grant an injunction to preserve the *status quo*.

CONCLUSION

For the foregoing reasons, the Court should enter a preliminary injunction enjoining the implementation of the PUC Order.

Respectfully submitted,

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September 24, 2003

GP:1504942 v1

Exhibit 7

Vonage Holdings Corp. v. Minnesota Pub. Utils. Comm'n, 290 F.Supp.2d 993 (D. Minn. 2003)

and

Vonage Holdings Corp. v. Minnesota Pub. Utils. Comm'n, No. Civ. 03-5287(MJD/JG), 2004 WL 114983 (D.Minn. 2004)





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(Cite as: 290 F.Supp.2d 993)



Motions, Pleadings and Filings

United States District Court, D. Minnesota.

VONAGE HOLDINGS CORPORATION, Plaintiff,

V.

THE MINNESOTA PUBLIC UTILITIES COMMISSION, and Leroy Koppendrayer, Gregory Scott, Phyllis Reha, and R. Marshall Johnson, in their official capacities as

the commissioners of the Minnesota Public Utilities Commission and not as individuals, Defendants.

No. CIV.03-5287 (MJD/JGL).

Oct. 16, 2003.

Marketer of service permitting computer-to-computer and computer-to-phone voice calls using Voice over Internet Protocol (VoIP) sought injunctive relief from state utility regulatory commission's order that provider comply with state laws regulating telephone companies. The District Court, Davis, J., held that VoIP service was "information service" rather than telecommunications service under Telecommunications Act, precluding state commission's effort to subject marketer to state telecommunications laws.

Permanent injunction granted.

West Headnotes

[1] Injunction 138.1 212k138.1 Most Cited Cases

Factors in determining motion for preliminary injunction are: (1) movant's probability of success on merits; (2) threat of irreparable harm to movant; (3) balance between this harm and injury that granting injunction will inflict on other interested parties; and (4) public interest in issuance of injunction.

[2] Injunction € 106 212k106 Most Cited Cases Where parties only disagree on questions of law, motion for preliminary injunction may be considered as one for permanent injunction.

[3] Injunction 9 212k9 Most Cited Cases

Standard for permanent injunction is same as that for preliminary injunction except that movant must show actual success on merits.

18.3 360k18.3 Most Cited Cases

Preemption of state law occurs when: (1) Congress enacts federal statute that expresses its clear intent to preempt state law; (2) there is conflict between federal and state law; (3) compliance with both federal and state law is in effect physically impossible; (4) federal law contains implicit barrier to state regulation; (5) comprehensive congressional legislation occupies entire field of regulation; or (6) state law is obstacle to accomplishment and execution of full objectives of Congress. <u>U.S.C.A.</u> Const. Art. 6, cl. 2.

[5] States 18.9 360k18.9 Most Cited Cases

Federal agency acting within scope of its congressionally delegated authority may preempt state regulation. <u>U.S.C.A. Const. Art. 6, cl. 2</u>.

[6] Telecommunications 461.15 372k461.15 Most Cited Cases

"Information services" are not subject to telecommunications regulation. 47 U.S.C.A. § 153(20); 47 C.F.R. § 64.702(a).

18.81 <u>Most Cited Cases</u> Most Cited Cases

Telecommunications 461.15 372k461.15 Most Cited Cases

Service utilizing Voice over Internet Protocol (VoIP), which allowed those with access to high-speed Internet connection to make and receive computer-to-

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computer and computer-to-phone voice calls, was "information service" rather than telecommunications service under Telecommunications Act, precluding state utility regulatory commission from subjecting marketer of VoIP service to state laws regulating telephone companies; marketer, which was not an internet service provider (ISP) and never provided phone-to-phone IP telephony, was user rather than provider of telecommunications services. Communications Act of 1934, § § 3(20, 46), 230(b), as amended, 47 U.S.C.A. § \$ 153(20, 46), 230(b); 47 C.F.R. § 64.702(a); M.S.A. § \$ 237.16 sub. 1(b), 237.74 subd. 12.

[8] States 18.3 360k18.3 Most Cited Cases

Where federal policy is to encourage certain conduct, state law discouraging that conduct must be preempted.

West Codenotes

Preempted

Minn.Stat. § 237.16

Minn.Stat. § 237.74

*994 Ky E. Kirby, Russell M. Blau (pro hac vice), Swidler Berlin Shereff Friedman, LLP, Adam M. Nathe, Gray, Plant, Mooty, Mooty & Bennett, P.A., for Plaintiff.

Steven H. Alpert, Assistant Minnesota Attorney General, for Defendant.

MEMORANDUM AND ORDER

DAVIS, District Court Judge.

I. SUMMARY

This case illustrates the impact of emerging technologies evolving ahead of the regulatory scheme intended to address them. The issue before the Court is tied to the evolution of the Internet and the expansion of its capability to transmit voice communications. Despite its continued growth and development, the Internet remains in its infancy, and is an uncharted frontier with vast unknowns left to explore. Congress has expressed a clear intent to leave the Internet free from undue regulation so that this growth and exploration may continue. Congress

also differentiated between "telecommunications services," which may be regulated, and "information services," which like the Internet, may not.

Plaintiff Vonage Holdings Corporation ("Vonage") provides a service that permits voice communications over the Internet. The Minnesota Public Utilities Commission ("MPUC") issued an order requiring Vonage to comply with Minnesota laws that regulate telephone companies. Vonage has asked this Court to enjoin the MPUC, arguing that it provides information services, and not telecommunications services.

The Court concludes that Vonage is an information service provider. In its role as an interpreter of legislative intent, the Court applies federal law demonstrating Congress's desire that information services such as those provided by Vonage must not be regulated by state law enforced by the MPUC. State regulation would effectively decimate Congress's mandate that the Internet remain unfettered by regulation. The Court therefore grants Vonage's request for injunctive relief.

II. INTRODUCTION

This matter is before the Court on Vonage's motion for a preliminary injunction seeking to prevent enforcement of the MPUC's September 11, 2003 order. As detailed below, because the facts of this case are not in dispute, the Court will address Vonage's motion as one for a permanent injunction.

III. FACTUAL BACKGROUND

Vonage markets and sells Vonage DigitalVoice, a service that permits voice communication via a high-speed ("broadband") Internet connection. [FN1] Vonage's service *995 uses a technology called Voice over Internet Protocol ("VoIP"), which allows customers to place and receive voice transmissions routed over the Internet.

FN1. In addition to broadband access via cable or DSL service, wireless broadband connections are becoming more widely available to consumers. *See* Yardena Arar, *DSL Speeds, Cellular Coverage*, PC World, Oct. 2003, at 30. The Court notes that such innovations may have unknown implications for communications as we now know them and the manner in which they are regulated.

(Cite as: 290 F.Supp.2d 993)

Traditional telephone companies use circuit-switched technology. Chérie R. Kiser & Angela F. Collins, *Regulation On The Horizon: Are Regulators Poised To Address the Status of IP Telephony?*, 11 CommLaw Conspectus 19, 20-21 (2003). A person using a traditional telephone, or plain old telephone service ("POTS"), is connected to the public switched telephone network ("PSTN"), which is operated by local telephone companies. Voice communication using the Internet has been called Internet Protocol ("IP") telephony, and rather than using circuit switching, it utilizes "packet switching," a process of breaking down data into packets of digital bits and transmitting them over the Internet. *Id.* at 21.

Essential to using Vonage's services is that a third-party Internet service provider ("ISP"), provides a broadband Internet connection. Vonage does not function as an ISP for its customers. A Vonage customer may make and receive computer-to-computer calls. With another person connected to the PSTN, a Vonage customer may make computer-to-phone calls and receive phone-to-computer calls. During computer-to-computer calls, via a broadband Internet connection, an outgoing voice communication is converted into IP data packets which then travel the Internet to the person using a second computer.

For computer-to-phone calls and phone-to-computer calls, Vonage uses a computer to transform the IP data packets into a format compatible with the PSTN, and vice versa. Rather than using the POTS equipment, Vonage's customers use special customer premises equipment ("CPE") that enables voice communication over the Internet.

Vonage obtains ten-digit telephone numbers from telephone companies that it then uses to provide service to its customers. PSTN users may dial that ten-digit number and reach one of Vonage's customers. A telephone number associated with a Vonage customer is not associated with that customer's physical location. The number is instead associated with the customer's computer. Vonage's customers may use Vonage's services at any geographic location where they can access a broadband Internet connection. Thus, a customer could make and receive calls anywhere in the world where broadband access is available. Vonage is not capable of determining the geographic location from which its customers access its service.

Vonage has approximately 500 customers with

billing addresses in Minnesota. It also has thirtyeight customers with Minnesota billing addresses who have requested telephone numbers with area codes not geographically situated within Minnesota, and eighty-eight customers with billing addresses outside of Minnesota who have requested telephone numbers geographically situated within Minnesota. Because Vonage is unable to determine the geographic location of its customers, it requires customers to register their location before they can dial "911" for public safety purposes.

The Minnesota Department of Commerce ("MDOC") investigated Vonage's services and on July 15, 2003, filed a complaint with the MPUC. The complaint alleged that Vonage failed to (1) obtain a *996 proper certificate of authority required to provide telephone service in Minnesota; (2) submit a required 911 service plan; (3) pay 911 fees; and (4) file a tariff. MDOC also requested temporary relief; asserting that Vonage should be (1) prohibited from marketing to potential customers; (2) required to notify its Minnesota customers regarding the issues before the MPUC; and (3) required to submit a 911 plan. The MPUC denied the request for temporary relief.

Vonage then moved to dismiss the MDOC complaint. The MPUC issued a notice on August 1, 2003 stating that it would address two procedural matters at an August 13, 2003 meeting, but did not indicate that the MPUC would be hearing the merits of the case. Four days later, the MPUC changed course, and asked the parties to address the merits. Vonage and several other parties seeking to intervene or participate appeared for oral argument on August 13, 2003. At the hearing, Vonage's representative requested that a contested proceeding be held, so that facts could be developed. The MPUC declined this request. After issuing an oral decision on the hearing date, the MPUC issued a nine-page order on September 11, 2003 concluding that, within thirty days, Vonage was required to comply with Minnesota statutes and rules regarding the offering of telephone service. See In the Matter of the Complaint of the Minnesota Department of Commerce Against Vonage Holding Corp Regarding Lack of Authority to Operate in Minnesota, Docket No. P-6214/C-03-108 (Minn. Pub. Utils. Comm'n Sept. 11, 2003) (order finding jurisdiction and requiring compliance). Vonage then filed a complaint with this Court seeking a preliminary injunction.

IV. DISCUSSION

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[1][2][3] When deciding a motion for a preliminary injunction, the Court should consider: (1) the moving party's probability of success on the merits; (2) the threat of irreparable harm to the moving party; (3) the balance between this harm and the injury that granting the injunction will inflict on other interested parties; and (4) the public interest in the issuance of the injunction. Dataphase Sys., Inc. v. C L Sys., Inc., 640 F.2d 109, 114 (8th Cir.1981) (en banc). "None of these factors by itself is determinative; rather, in each case the four factors must be balanced to determine whether they tilt toward or away from granting a preliminary injunction." West Publishing Co. v. Mead Data Central, Inc., 799 F.2d 1219. 1222 (8th Cir.1986) (citing Dataphase, 640 F.2d at 113). The party requesting injunctive relief bears the "complete burden" of proving all the factors. Gelco Corp. v. Coniston Partners, 811 F.2d 414, 418 (8th Where the parties only disagree on questions of law, a motion for a preliminary injunction may be considered as one for a permanent injunction. See Bank One v. Guttau, 190 F.3d 844, 847 (8th Cir.1999) (reviewing preliminary injunction as permanent injunction where only issues were questions of law). The parties do not dispute fact issues, and thus the Court will consider Vonage's motion as one for a permanent injunction. The standard is the same for a permanent injunction except that the movant must show actual success on the merits. Amoco Prod. Co. v. Vill. of Gambell, 480 U.S. 531, 546 n. 12, 107 S.Ct. 1396. 1404. 94 L.Ed.2d 542 (1987).

A. Success on the Merits

The issue before the Court is whether Vonage may be regulated under Minnesota law that requires telephone companies to obtain certification authorizing them to provide telephone service. See Minn.Stat. § 237.16, subd. 1(b) (providing that in order to obtain certificate, person must possess "the technical, managerial, and financial resources to provide the proposed *997 telephone services"); see also Minn.Stat. § 237.74, subd. 12 (requiring certificate of territorial authority); Minn. R. 7812.0200, subp. 1 (requiring certificate). Vonage asserts that the Communications Act of 1934, as amended by the Communications Act of 1996, 47 U.S.C. § § 151-615 ("the Communications Act") pre-empts the state authority upon which the MPUC's In addition to other arguments order relies. supporting pre-emption, Vonage asserts that because its services are "information services," which are not subject regulation, rather to

"telecommunications services," which may be regulated. Vonage further argues that the MPUC's order is unconstitutional because it violates the Commerce Clause and the Due Process Clause.

[4][5] The Supremacy Clause of Art. VI of the Constitution empowers Congress to pre-empt state law. Louisiana Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 368, 106 S.Ct. 1890, 1898, 90 L.Ed.2d 369 Pre-emption occurs when (1) Congress (1986).enacts a federal statute that expresses its clear intent to pre-empt state law; (2) there is a conflict between federal and state law; (3) "compliance with both federal and state law is in effect physically impossible;" (4) federal law contains an implicit barrier to state regulation; (5) comprehensive congressional legislation occupies the entire field of regulation; or (6) state law is an obstacle to the "accomplishment and execution of the full objectives of Congress." Louisiana PSC, 476 U.S. at 368-69, 106 S.Ct. at 1898. Moreover, "a federal agency acting within the scope of its congressionally delegated authority may pre-empt state regulation." Id. at 369, 106 S.Ct. at 1898-99.

At the outset, the Court must note that the backbone of Vonage's service is the Internet. Congress has spoken with unmistakable clarity on the issue of regulating the Internet: "It is the policy of the United States ... to preserve the vibrant and competitive free market that presently exists for the Internet and other interactive computer services, unfettered by Federal or State regulation." 47 U.S.C. § 230(b); see also Southwestern Bell Tel. Co. v. FCC, 153 F.3d 523, 544 (8th Cir.1998) (concluding that, based on Congress's intent to leave Internet unregulated, ISPs should be excluded from the imposition of interstate access charges); Zeran v. America Online, Inc., 129 F.3d 327, 330 (4th Cir.1997) (recognizing that "Congress acted to keep government regulation of the Internet to a minimum").

In addressing the parties' arguments, the Court must also examine the recent history of the regulatory scheme governing the telecommunications industry. The growing capability of the computer and its interaction with telecommunications technology presented challenges acknowledged by the Federal Communications Commission ("FCC") over twenty years ago. In 1980, recognizing the computer's involvement with telecommunications, the FCC "basic services" distinguished between and "enhanced services." See In the Matter of Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry),

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77 FCC 2d 384, ¶ 5 (1980) (Final Decision) ("Second Computer Inquiry"). FN2 After making this distinction, *998 the FCC noted that basic services offered by a common carrier would continue to be regulated by Title II of the Communications Act, but that

FN2. The FCC stated:

[W]e adopt a regulatory scheme that distinguishes between the common carrier offering of basic transmission services and the offering of enhanced services ... We find that basic service is limited to the common carrier offering of transmission capacity for the movement of information, whereas enhanced service combines basic service with computer processing applications that act on the format, content, code, protocol or the similar aspects of subscriber's transmitted information, or provide the different, additional, subscriber or restructured information. involve or subscriber interaction with stored information.

Second Computer Inquiry ¶ 5.

regulation of enhanced services is not required in furtherance of some overall statutory objective. In fact, the absence of traditional public utility regulation of enhanced services offers the greatest potential for efficient utilization and full exploitation of the interstate telecommunications network.

Id. ¶ 7, at 387. [FN3]

FN3. Later, as the FCC went further to protect enhanced services from regulation it discussed a theory of "contamination" whereby "[t]he enhanced component of [service providers'] offerings 'contaminates' the basic component, and the entire offering is therefore considered to be enhanced." *In re Amendment to Sections 64.702 of the Commission's Rules and Regulations* (Third Computer Inquiry), 3 FCC Red. 11501, 1170 n. 23 (1988).

The line demarcating basic services from enhanced services became more defined when, in passing the Communications Act of 1996, Congress defined the terms "telecommunications," [FN4] "telecommunications services" [FN5] and

"information services." [FN6] See 47 U.S.C. § 153.

FN4. "The term 'telecommunications' means the transmission, between or among points specified by the user, of information of the user's choosing, without change in the form or content of the information as sent and received." 47 U.S.C. § 153(43).

FN5. "Telecommunications service" is "the offering of telecommunications for a fee directly to the public, or to such classes of users as to be effectively available directly to the public, regardless of the facilities used." 47 U.S.C. § 153(46).

FN6. "Information service" is defined as "the offering of a capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications, and includes electronic publishing, but does not include any use of any such capability for the management, control, or operation of a telecommunications system or the management of a telecommunications service." 47 U.S.C. § 153(20).

[6] In a report to Congress regarding universal service that addressed many of the issues before the Court in this matter, the FCC explained that the new terms it adopted to describe different types of communications services were comparable to the old. *In re Federal-State Joint Board on Universal Service,* 13 FCC Rcd. ¶ 21, at 11511 (April 10, 1998) (Report to Congress) ("Universal Service Report"). [FN7] The court has examined both the legislative history of the Communications Act of 1996 and the Universal Service Report, and agrees with the FCC's interpretation of congressional intent. The Universal Service Report provided enhanced clarity with regard to the distinction between traditional telephone services offered by common carriers, and the continuously growing universe of information services. It also solidified and added a supportive layer to the historical architecture of the as yet largely unregulated universe of information services. The FCC noted the "intention of the drafters of both the House and Senate bills that the two categories be separate and distinct, and that information service providers not be subject to telecommunications *999

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regulation." *Id.* ¶ 43, at 11523. In addition to the positions taken by the FCC, Congress has expressly stated that enhanced services _[FN8] are not to be regulated under Title II of the Telecommunications Act. 47 C.F.R. § 64.702(a).

FN7. "Specifically, we find that Congress the categories 'telecommunications service' and 'information service' parallel to the definitions of 'basic service' and 'enhanced service.' " In re Federal-State Joint Board on Universal Service, 13 FCC Rcd. ¶ 21, at 11511 (April 10, 1998) (Report to Congress) ("Universal Service Report"). Further, the FCC found that "[t]he language and legislative history of both the House and [which Senate bills became the Communications Act of 1996] indicate that drafters of each bill regarded the telecommunications services information services as mutually exclusive categories." Id. ¶ 43, at 11521-22.

FN8. Enhanced services are defined as "services, offered over common carrier transmission facilities used in interstate communications, which employ computer processing applications that act on the format, content, code, protocol or similar aspects of the subscriber's transmitted information."

47 C.F.R. § 64.702(a); Universal Service Report, 13 FCC Rcd. ¶
21, at 11511 (stating that the definition for enhanced services parallels the definition of information services).

[7] Examining the statutory language of the Communications Act, the Court concludes that the VoIP service provided by Vonage constitutes an information service because it offers the "capability for generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information via telecommunications." 47 U.S.C. § 153(20). The process of transmitting customer calls over the Internet requires Vonage to "act on" the format and protocol of the information. 47 C.F.R. § 64.702(a). For calls originating with one of Vonage's customers, calls in the VoIP format must be transformed into the format of the PSTN before a POTS user can receive the call. For calls originating from a POTS user, the process of acting on the

format and protocol is reversed. The Court concludes that Vonage's activities fit within the definition of information services. Vonage's services are closely tied to the provision of telecommunications services as defined by Congress, the courts and the FCC, but this Court finds that Vonage *uses* telecommunications services, rather than provides them.

Looking beyond the plain statutory language, the Court also examines the nature of IP telephony, a subject that by its very nature calls into question the telecommunications services/information services distinction adopted by the 1996 Communications Act. [FN9] At issue is whether Vonage's IP telephony service constitutes a telecommunications service or an information service.

<u>FN9.</u> There are three types of IP telephony: computer-to-computer telephony, telephone-to-computer telephony, and telephone-to-telephone telephony. Kiser & Collins, *supra*, at 21. Vonage's services encompass only the first two.

In the Universal Service Report, the FCC examined two types of IP telephony: phone-to-phone and computer-to-computer. The FCC refrained from explicitly classifying either type as telecommunications service or an information service. [FN10] The FCC tentatively concluded that phone-to-phone ΙP telephony "lacks characteristics that would render them 'information services' within the meaning of the statute, and instead bear the characteristics 'telecommunications services." Universal Service Report, 13 FCC Rcd. ¶ 89, at 11544. The FCC devised a set of conditions used to determine whether a provider's offering constituted phone-to-phone IP telephony.

FN10. The FCC concluded that with regard to phone-to-phone IP telephony it was not "appropriate to make any definitive pronouncements in the absence of a more complete record focused on individual service offerings." *Universal Service Report*, 13 FCC Rcd. ¶ 3, at 11503.

In using the term 'phone-to-phone' IP telephony, we tentatively intend to refer to services in which the provider meets the following conditions: (1) it

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Id. ¶ 88, at 11543-44.

holds itself out as providing voice telephony or facsimile transmission service; (2) it does not require the customer to use CPE different from that CPE necessary *1000 to place an ordinary touchtone call (or facsimile transmission) over the public switched telephone network; (3) it allows the customer to call telephone numbers assigned in accordance with the North American Numbering Plan, and associated international agreements; and (4) it transmits customer information without net change in form or content.

In applying the FCC's four phone-to-phone IP telephony conditions to Vonage, it is clear that Vonage does not provide phone-to-phone IP telephony service. Vonage's services do not meet the second and fourth requirements. Use of Vonage's service requires CPE different than what a person connected to the PSTN uses to make a touch-tone Further, a net change in form and content occurs when Vonage's customers place a call. If the end user is connected to the PSTN, the information transmitted over the Internet is converted from IP into a format compatible with the PSTN. Vonage's service is not a telecommunications service because "from the user's standpoint" the form of a transmission undergoes a "net change." Id. ¶ 89, at 11544.

With regard to computer-to-computer IP telephony, declined to decide whether the FCC 'telecommunications' is taking place in the transmission of computer-to-computer IP telephony." 87, at 11543. When Vonage's users communicate with other customers in computer-tocomputer IP telephony, the two customers are again using the Internet to transmit data packets which, by their very nature change form and do not come in contact with the regulated PSTN. Vonage's service effectively carves out a role in the communications scheme that distinguishes it from telecommunications services.

In addition to a generic analysis of the varying forms of IP telephony, the FCC examined whether three classes of providers that facilitate IP telephony provide telecommunications services. First, the FCC stated that "[c]ompanies that only provide software and hardware installed at customer premises do not fall within [the telecommunications provider] category, because they do not transmit information." Id. ¶ 86, at 11543. Second, it concluded that ISPs did "not appear to be 'provid[ing]' telecommunications to its subscribers." Id. ¶ 87, at 11543 (alteration in original) (quotation omitted).

Third, it addressed the role of "an IP telephony service provider [that] deploys a gateway within the network to enable phone-to-phone service." "[G]ateways" are "computers that transform the circuit-switched voice signal into IP packets, and vice versa, and perform associated [signaling], control, and address translation functions." Id. ¶ 84, at The FCC concluded that such services 11541. possessed "the characteristics of 'telecommunications services.' " Id. ¶ 89, at 11544. conclusion focused on gateway providers that provide phone-to-phone IP telephony services. The FCC noted that from a "functional standpoint," the users were only receiving voice transmission, and not information services. Id. In other words, because a person using a POTS telephone was on either end of the call, even if the call was routed over the Internet, there was no form change sufficient to constitute information services.

Vonage is unlike the first two classes of providers discussed by the FCC; it does more than merely provide software and hardware, and is not an ISP. Vonage does, however, provide gateways that translate IP format into a format compatible with the PSTN. Because Vonage never provides phone-to-phone IP telephony (it only provides computer-to-phone or phone-to-computer IP telephony), from a "functional standpoint," Vonage's service is distinguishable *1001 from the scenario the FCC considered to be telecommunications services.

The FCC was aware of the relationship that information services providers often have with providers of telecommunications services, remain recognized that the two should "[W]hen an distinguishable. entity offers transmission incorporating the 'capability generating, acquiring, storing, transforming, processing, retrieving, utilizing, or making available information,' it does not offer telecommunications. Rather, it offers an 'information service' even though it uses telecommunications to do so. Id. ¶ 39, at 11520 (emphasis added). Further, the FCC recognized that the architecture of information services would be built on top of existing telecommunications services infrastructure, but, in terms of regulation, would still remain separate for strong policy purposes.

The Internet and other enhanced services have been able to grow rapidly in part because the Commission concluded that enhanced service providers were not common carriers within the

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meaning of the Act. This policy of distinguishing competitive technologies from regulated services not vet subject to full competition remains viable. Communications networks function as overlapping layers, with multiple providers often leveraging a common infrastructure. As long as the underlying market for provision of transmission facilities is competitive or is subject to sufficient procompetitive safeguards, we see no need to regulate the enhanced functionalities that can be built on top of those facilities. We believe that Congress, by distinguishing 'telecommunications service' from 'information service,' and by stating a policy goal of preventing the Internet from being fettered by state or federal regulation, endorsed this general approach. Limiting carrier regulation to those companies that provide the underlying transport ensures that regulation is minimized and is targeted to markets where full competition has not emerged. As an empirical matter, the level of competition, innovation, investment, and growth in the enhanced services industry over the past two decades provides a strong endorsement for such an approach.

Id. ¶ 95, 11546 (emphasis added) (footnotes omitted). "Congress intended to maintain a regime in which information service providers are not subject to regulation as common carriers merely because they provide their services 'via telecommunications.' " Id. 21, at 11511. The Court acknowledges the attractiveness of the MPUC's simplistic "quacks like a duck" argument, essentially holding that because Vonage's customers make phone calls, Vonage's services must be telecommunications services. However, this simplifies the issue to the detriment of an accurate understanding of this complex question. The Court must follow the statutory intent expressed by Congress, and interpreted by the FCC. Short of explicit statutory language, the Court can find no stronger guidance for determining that Vonage's service is an information service, as defined by Congress and interpreted by the FCC.

Having determined that Vonage's services constitute information services, the Court next examines Congress's intent with regard to state regulation of information services, to determine whether the MPUC's order is pre-empted. By clearly separating information services from telecommunications services, the Court finds ample support for the proposition that Congress intended to keep the Internet and information services unregulated.

Because Congress has expressed an intent that services like Vonage's must remain unregulated by

the Communications Act, and because the MPUC has exercised state authority to regulate Vonage's service, *1002 the Court concludes that that state and federal laws conflict, and pre-emption is necessary. *Louisiana PSC*, 476 U.S. at 368, 106 S.Ct. at 1898.

[8] Where federal policy is to encourage certain conduct, state law discouraging that conduct must be pre-empted. See Xerox Corp. v. County of Harris, 459 U.S. 145, 151-53, 103 S.Ct. 523, 527-29, 74 L.Ed.2d 323 (1982) (holding state tax could not be imposed on Mexican-manufactured goods shipped to the United states where Congress clearly intended to create a duty-free enclave to encourage merchants to use American ports); see also 1 Laurence H. Tribe, American Constitutional Law § 6-29, at 1181-82 (3d ed.2000) ("state action must ordinarily be invalidated if its manifest effect is to penalize or discourage conduct that federal law specifically seeks to encourage").

In the *Universal Service Report*, the FCC explained that policy considerations required keeping the definition of telecommunications services distinct from information services so that information services would be open to healthy competition. Its discussion demonstrates the FCC's reluctance to permit state regulation of information services providers, foreshadowing the very issue before the Court today:

An approach in which a broad range of information service providers are simultaneously classed as telecommunications carriers. and presumptively subject to the broad range of Title II constraints, could seriously curtail the regulatory freedom that the Commission concluded in Computer II was important to the healthy and competitive development of the enhanced-services industry.... The classification of information service providers as telecommunications carriers, moreover, could encourage states to impose common-carrier regulation on such providers.... State requirements for telecommunications carriers vary from jurisdiction to jurisdiction, but include certification, tariff filing, and various reporting requirements and fees.

Universal Service Report, 13 FCC Rcd. ¶ 46, at 11524. The Court thus concludes that Minnesota regulations that have the effect of regulating information services are in conflict with federal law and must be pre-empted.

The MPUC argues that the true issue in this case is whether it is possible to comply with both federal and state laws. According to the MPUC, there is no

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conflict between state and federal law, and compliance with both is possible. The MPUC further asserts that the FCC has not yet exercised its authority to regulate VoIP services, and has not prevented the states from doing so. The Court respectfully disagrees. VoIP services necessarily are information services, and state regulation over VoIP services is not permissible because of the recognizable congressional intent to leave the Internet and information services largely unregulated.

The Court also concludes that Congress's expression of its intent to not have Title II apply to enhanced services demonstrates its intent to occupy the field of regulation of information services. 47 C.F.R. § 64.702(a); *Louisiana PSC*, 476 U.S. at 368, 106 S.Ct. at 1898 (providing for pre-emption where comprehensive congressional legislation occupies the entire field of regulation).

[I]n very narrow circumstances, when the federal government has withdrawn from a field and indicated an intent to ensure that a vacuum be left behind, at least some state laws--even if generally applicable and seemingly unrelated to the vacated field--might become unenforceable. Still, the supposed preemptive effects of *de* regulation remain a matter of congressional intent to continue *1003 to occupy the field, but to do so with a vacuum.

Tribe, *supra* § 6-31, at 1207 (emphasis original). We believe that Congress, by distinguishing 'telecommunications service' from 'information service,' and by stating a policy goal of preventing the Internet from being fettered by state or federal regulation, endorsed this general approach. Limiting carrier regulation to those companies that provide the underlying transport ensures that regulation is minimized and is targeted to markets where full competition has not emerged.

Universal Service Report, 13 FCC Rcd. ¶ 95, at 11546 (footnote omitted). Considering this expression of congressional intent, the MPUC's order would be an obstacle to the "accomplishment and execution of the full objectives of Congress." Louisiana PSC, 476 U.S. at 368-69, 106 S.Ct. at 1898. The Court understands the MPUC's position, but that position will have the unintended consequence of retarding the expansion of the Internet.

To summarize, it is clear that Congress has distinguished telecommunications services from information services. The purpose of Title II is to regulate telecommunications services, and Congress has clearly stated that it does not intend to regulate

the Internet and information services. Vonage's services do not constitute a telecommunications service. It only uses telecommunications, and does not provide them. The Court can find no statutory intent to regulate VoIP, and until Congress speaks more clearly on this issue, Minnesota may not regulate an information services provider such as Vonage as if it were a telecommunications provider. What Vonage provides is essentially the enhanced functionality on top of the underlying network, which the FCC has explained should be left alone. *Universal Service Report*, 13 FCC Rcd. ¶ 95, at 11546.

Because the Court concludes that the MPUC's order is pre-empted for the previously-stated reasons, it need not reach Vonage's remaining arguments regarding pre-emption, or its Commerce Clause and Due Process arguments. Accordingly, the Court concludes that Vonage's argument that the MPUC's order is pre-empted will succeed on the merits.

B. Irreparable Harm

Vonage contends that the MPUC's order will cause it irreparable harm because it will be forced to stop serving customers in Minnesota and stop soliciting new business. Vonage claims that even a brief shutdown of its service to Minnesota customers could prevent it from staying the leader of its business niche, and damage its reputation and goodwill. Loss of intangible assets such as reputation and goodwill can constitute irreparable injury. See General Mills, Inc. v. Kellogg Co., 824 F.2d 622, 625 (8th Cir.1987). The Court finds that enforcing the MPUC order will result in irreparable harm to Vonage.

C. Balance of Harms

According to Vonage, with approximately 500 customers with Minnesota billing addresses, continuing to service those customers cannot create any harm to the health and safety of Minnesota consumers. The Court concludes that permitting Vonage to continue operations in Minnesota and solicit new customers poses little risk of harm to the interests the MPUC represents. Enforcing the MPUC's order, however, would pose a disproportionate harm upon Vonage. The balance of harms weighs in favor of Vonage.

D. Public interest

Vonage contends that it is in the public's interest that a preliminary/permanent *1004 injunction be

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granted, because customers can benefit from its product. Defendants respond that Vonage's failure to comply with the 911 plan is not in the public's interest, and that other companies who do comply with Minnesota law are at a competitive disadvantage. The Court concludes that based on the previously-discussed congressional intent to leave Internet and information services unregulated, granting an injunction is in the public interest.

Having satisfied the <u>Dataphase</u> elements, the court concludes that a permanent injunction preventing enforcement of the MPUC's September 11, 2003 order is proper.

Accordingly, based on all the files, records and proceedings herein, IT IS HEREBY ORDERED that Vonage's motion for preliminary injunction, which the Court considers a motion for permanent injunction is GRANTED.

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Motions, Pleadings and Filings (Back to top)

- 2003 WL 23335187 (Trial Motion, Memorandum and Affidavit) Reply Brief of Vonage Holdings Corporation to Response of Minnesota Public Utilities Commission to Vonage's Motion for a Preliminary Injunction (Oct. 06, 2003)
- <u>2003 WL 23335186</u> (Trial Motion, Memorandum and Affidavit) Response of Minnesota Public Utilities Commission to Vonage Motion for a Preliminary Injunction (Oct. 03, 2003)
- <u>2003 WL 23335190</u> (Trial Motion, Memorandum and Affidavit) Memorandum in Support of Vonage Holdings Corporation's Motion for Preliminary Injunction (Sep. 24, 2003)
- <u>0:03CV05287</u> (Docket) (Sep. 23, 2003)

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Motions, Pleadings and Filings

Only the Westlaw citation is currently available.

United States District Court, D. Minnesota.

VONAGE HOLDINGS CORPORATION, Plaintiff,

THE MINNESOTA PUBLIC UTILITIES COMMISSION, and Leroy Koppendrayer, Gregory Scott, Phyllis Reha, and R. Marshall Johnson, in their official capacities as

the commissioners of the Minnesota Public Utilities Commission and not as individuals, Defendants.

No. Civ. 03-5287(MJD/JG.

Jan. 14, 2004.

Ky E. Kirby, Swidler Berlin Shereff Friedman, LLP, <u>Gregory Merz</u>, Gray, Plant, Mooty, Mooty & Bennett, P.A., for Plaintiff.

Steven H. Alpert, Assistant Minnesota Attorney General, for Defendants.

<u>Robert E. Cattanach, Theresa M. Bevilacqua,</u> Dorsey & Whitney LLP, for Qwest.

Karen Finstad Hammel, Linda S. Jensen, Assistant Attorneys General, for the Minnesota Department of Commerce.

MEMORANDUM AND ORDER

DAVIS, J.

I. INTRODUCTION

*1 This matter is before the Court on (1) Qwest Corporation ("Qwest")'s motion to intervene and to amend judgment; (2) the Minnesota Public Utilities Commission ("MPUC")'s motion for amended findings of fact, conclusions of law and judgment, or in the alternative, a new trial; and (3) the Minnesota

Department of Commerce ("MDOC")'s motion to intervene. For the reasons discussed below, the Court denies all motions.

I. BACKGROUND

Although the Court's October 16, 2003 Order ("Order") sets out a more comprehensive version of the factual background underlying the motions currently before the Court, a brief reiteration of key facts is necessary. Vonage Holdings Corporation ("Vonage") markets and sells Vonage DigitalVoice, a service that permits voice communication via a broadband Internet connection. While a person using a traditional telephone is connected to the public switched telephone network ("PSTN") operated by local telephone companies, Vonage's service uses a technology called Voice over Internet Protocol ("VoIP"). The MDOC investigated Vonage's services and on July 15, 2003, it filed a complaint with the MPUC, alleging that Vonage failed to comply with laws regulating telephone companies. Eventually, the MPUC issued an order concluding that, within thirty days, Vonage was required to comply with Minnesota statutes and rules regarding the offering of telephone service. See In the Matter of the Complaint of the Minnesota Department of Commerce Against Vonage Holding Corp Regarding Lack of Authority to Operate in Minnesota, Docket No. P-6214/C-03-108 (Minn. Pub. Utils. Comm'n Sept. 11, 2003) (order finding jurisdiction and requiring compliance). Vonage then filed a complaint with this Court seeking a preliminary injunction.

On October 16, 2003, the Court issued an order permanently enjoining the Minnesota Public Utilities Commission ("MPUC") from regulating Vonage as a telephone company. As noted above, post-judgment motions are now before the Court for consideration.

II. DISCUSSION

A. Qwest motions

Qwest moves the Court to intervene, both as a matter of right and by permissive intervention. It also requests that the Court amend its judgment.

1. Intervention as a matter of right

A party requesting intervention as a matter of right

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must establish that the elements of Fed.R.Civ.P. 24(a)(2) are met. Chiglo v. City of Preston, 104 F.3d 185, 187 (8th Cir.1997). Rule 24(a)(2) requires that (1) an intervenor has a cognizable interest in the subject matter of the litigation; (2) the interest may be impaired as a result of the litigation; and (3) the interest is not adequately protected by the existing parties to the litigation. A motion to intervene must also be timely. United States v. Union Elec. Co., 64 F.3d 1152, 1158-59 (8th Cir.1995).

Rule 24(a)(2) also requires that a prospective intervenor demonstrate that it has Article III standing. See Mausolf v. Babbitt, 85 F.3d 1295, 1300 (8th Cir.1996) ("We conclude that the Constitution requires that prospective intervenors have Article III standing to litigate their claims in federal court."). Constitutional standing requires (1) an injury in fact, which is an invasion of a legally protected interest that is concrete, particularized, and either actual or imminent; (2) "a causal connection between the alleged injury and the conduct being challenged"; and (3) redressability. Id. at 1301 (citing Lujan v. Defenders of Wildlife, 504 U.S. 555, 560, 561, 112 S.Ct. 2130 (1992)).

a. Standing

*2 Vonage argues that Qwest is ineligible to intervene because it cannot demonstrate that it has an injury in fact. The most concrete injury alleged by Owest is that the Court's Order "could permit Vonage to claim that it is exempt from paying" telecommunications carriers like Owest for using their local exchange switching facilities. (emphasis added). The Court concludes that Qwest's claimed injury falls short of the requirement that it be "concrete and particularized" and "actual or imminent." Lujan, 504 U.S. at 560, 112 S.Ct. at 2136. Qwest has not demonstrated particularized injury it suffered as a direct result of the Order, considering that the Court's Order only applied directly to Vonage. Any indirect harm claimed by Qwest, such as a loss of fees, is speculative, and not sufficiently concrete to constitute an injury in fact. The Court thus concludes that Qwest does not have Article III standing to intervene.

b. Timeliness

"If the applicant's motion to intervene was not timely filed, the applicant is barred from intervening." <u>Union Elec.</u>, 64 F.3d at 1159. "The general rule is that motions for intervention made after entry of final judgment will be granted only upon a strong showing

of entitlement and of justification for failure to request intervention sooner." <u>U.S. v. Associated Milk Producers, Inc. 534 F.2d 113, 116 (8th Cir.1976)</u> (citations omitted). In determining whether a motion is timely, the Court must consider three factors: the reason for delay by the proposed intervenor, how far the litigation has progressed before the motion to intervene is filed, and how much prejudice the delay in seeking intervention may cause to other parties if intervention is allowed. <u>Union Elec.</u>, 64 F.3d at 1158-59.

Qwest argues that its motion is timely, even though it moves to intervene after the Court issued its Order. Qwest claims that it had no reason to believe that Vonage's motion for a preliminary injunction would become one for a permanent injunction, and upon issuance of the Court's order, Qwest acted promptly in filing its motion to intervene. Qwest also asserts that its intervention will not impede the process of the litigation or cause delays. Vonage argues that Qwest's motion is untimely, asserting that Qwest sought to intervene after judgment without offering a legitimate reason for its delay.

On the first page of its Amended Complaint, Vonage sought "preliminary and *permanent* injunctive relief." (emphasis added). Notwithstanding its title, Vonage's Motion for Preliminary Injunction contains the same language as the Complaint. Considering that Qwest admits that it was aware of the preliminary injunction motion before the Court issued its Order, it must have had notice of this language. The justification Qwest offers for its delay is not sufficient to permit post-Order intervention. As for the progression of the litigation, Owest moves for post-judgment intervention, which weighs in Vonage's favor. Finally, although conversion of the permanent injunction to a preliminary injunction would not substantially prejudice Vonage, future litigation would require it to address arguments and incur further legal costs for an entirely separate party than the MPUC. The Court concludes that Qwest's motion is untimely.

c. Interest in subject matter

*3 Qwest also argues that it has a substantial interest in the subject matter of this case. Qwest asserts that it is a direct competitor with Vonage and that classifying Vonage as an information service provider would prevent Qwest from obtaining reasonable compensation for using Qwest's facilities. Although the Court acknowledges Qwest's interest in how the law applies to Vonage, as noted above in the

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discussion regarding Article III standing, this interest is not sufficient to permit intervention.

d. Interests not represented by parties before the Court

Qwest contends that its interest in policy and regulatory issues are distinct from the parties to this action. Vonage asserts that Qwest's interests were adequately represented by the MPUC. Because Qwest requests a stay, and because the MPUC also requested a stay, Vonage claims that Qwest's interests were represented in these proceedings. The MPUC argues that Qwest's motion should be granted, echoing Qwest's arguments.

The Court acknowledges that Qwest has a distinct interest for which the MPUC did not advocate. It is clear that Qwest, unlike the MPUC, does not request that the Court alter its conclusion that Vonage's services constitute information services. Qwest simply wants the FCC to address this issue because of the weighty policy implications involved with regulation of VoIP. However, this procedural remedy and accompanying argument was offered by the MPUC in the proceedings leading up the Court's Order. The Court therefore concludes that Qwest's interests are adequately represented by a party currently before the Court.

2. Permissive intervention

In the alternative, Qwest argues that under Fed.R.Civ.P. 24(b), it should be permitted to intervene. Vonage contends that Qwest fails to show that it is entitled to do so. Rule 24(b) provides that

[u]pon timely application anyone may be permitted to intervene in an action ... when an applicant's claim or defense and the main action have a question of law or fact in common.... In exercising its discretion the court shall consider whether the intervention will unduly delay or prejudice the adjudication of the rights of the original parties.

"Permissive intervention to litigate a claim on the merits under Rule 24(b) requires (1) an independent ground for jurisdiction; (2) a timely motion; and (3) a common question of law and fact between the movant's claim or defense and the main action." Beckman Indus., Inc. v. Int'l Ins. Co., 966 F.2d 470, 473 (9th Cir.1992) (citation omitted). As discussed above, Qwest has not made a showing that there is an independent ground for jurisdiction, i.e. Article III standing, and its motion is untimely. The Court thus concludes that permissive is not appropriate. The

Court thus need not address Qwest's motion to amend judgment.

A. MPUC motions

The MPUC moves the Court for amended findings of fact, conclusions of law and judgment, or in the alternative, a new trial. In the alternative, the MPUC argues that the Court should convert its permanent injunction into a temporary one, and permit discovery. According to the MPUC, the court should amend its findings of fact "to indicate that it is unclear whether Vonage is a telecommunication service or an information service."

*4 The MPUC essentially asserts that the Court erred when it determined that Vonage offers information services. Citing evidence that was not before the Court when it issued its October 16th order, Qwest asserts that Vonage's services are not principally on the Internet and claims that Vonage's CEO stated that 97% of its calls touch the PSTN. The MPUC further states that because Vonage provides call forwarding, it provides a form of phone-to-phone telephony that should be regulated. The MPUC asserts that the equipment provided by Vonage may not qualify as CPE under the FCC's interpretation, and that this issue is at least a material fact question. The MPUC also requests further discovery on the issue of whether Vonage can comply with 911 requirements. Vonage responds that the undisputed demonstrate that Vonage does not provide phone-tophone IP telephony.

Even if the Court declines to alter its decision that Vonage provides information services, the MPUC argues that the Court should amend its order to reflect that federal law does not preempt state regulation of 911 service. According to the MPUC, the statutory scheme addressing 911 service does not show that Congress intended to prohibit state regulation of service providers telephone that are telecommunications carriers. The MPUC asserts that 47 U.S.C. § 251(e)(3) applies broadly, and includes all telephone services, even if they are provided via information services. Section 251(e)(3) provides that the 911 "designation shall apply to both wireline and wireless telephone service." Because section 251(e)(3) was adopted in 1999, the MPUC contends, and because VoIP was available by that time, Congress intended to subject VoIP telephone services to 911 requirements.

Further, the MPUC contends that FCC rules found in 47 C.F.R. § § 64 .3000-64.3004 place importance on

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a customer's intent to call 911, regardless of the technology underlying the call.

Vonage responds that it does not matter whether Vonage is capable of complying with 911 requirements, because the Court found that Vonage's services can not be subject to the requirements. Vonage further argues that state 911 regulations are preempted because the term "telephone service" has not been shown to include information services. Vonage claims that "telephone service" actually means "telecommunications services."

The Court declines to amend any aspect of its Order, and concludes that a new trial is not necessary. The MPUC bases its argument on information that was not part of the record when the court issued its Order, and thus could not have considered. Further, even if the Court had considered such information as evidence, its conclusion would have been the same. For the reasons explained in its Order, whether calls come into contact with the PSTN is does not alter the Court's conclusion that Vonage's services constitute information services. The Court declines to alter its conclusion that state 911 regulations are preempted. The MPUC has not demonstrated that the basis upon which the Court's Order was founded-that Congress intended information services to remain unregulatedis somehow impacted by 47 U.S.C. § 251(e)(3) and 47 C.F.R. § § 64.3000-64.3004.

B. MDOC motion

*5 MDOC seeks permissive intervention in order to participate in future proceedings resulting from any ruling the Court issues with regard to pending motions. In addition, MDOC supports the motions of the MPUC and Qwest to amend the Court's permanent injunction and to convert it to a preliminary injunction.

Under Minn.Stat. § \$ 216A.01 and 216A.07, subd. 2, the MDOC has a duty to enforce Chapters 216A, 216B, 237 and any order issued by the MPUC, and has the authority to participate in MPUC proceedings. Integral to the arguments of MDOC is the distinction between it and the MPUC. According to MDOC, its role is to be an advocate before the MPUC, while the MPUC possesses the quasi-judicial role of considering the parties' arguments. Minn.Stat. § 216A.02, subd. 4.

Unless it is allowed to intervene, MDOC contends, it may be unable to fulfill its duty pursuant to statute. MDOC also suggests that its intervention is required

to properly develop an evidentiary record.

MDOC contends that its motion is timely because it did not know at the time that Vonage filed its action before the Court that a permanent injunction would be issued. The Court concludes that MDOC's motion is untimely. Considering that the MDOC filed the complaint against Vonage with the MPUC, it was well aware of the contours and implications of this case. As noted above with regard to Qwest, Vonage's complaint and motion gave MDOC notice of Vonage's intent to seek permanent relief, and thus its arguments to the contrary fail. Further, the Court concludes that MDOC does not have a ground for jurisdiction that is independent from the MPUC. Although the MDOC has identified a distinction in terms of the statutory roles of the two agencies, the Court does not consider that distinction sufficient to justify intervention.

Accordingly, based on all the files, records and proceedings herein, IT IS HEREBY ORDERED that

- 1. Qwest's motion to intervene and to amend judgment is DENIED;
- 2. the MPUC's motion for amended findings of fact, conclusions of law and judgment, or in the alternative, a new trial is DENIED; and
- 3. the MDOC's motion to intervene is DENIED.

2004 WL 114983 (D.Minn.)

Motions, Pleadings and Filings (Back to top)

- 2003 WL 23335187 (Trial Motion, Memorandum and Affidavit) Reply Brief of Vonage Holdings Corporation to Response of Minnesota Public Utilities Commission to Vonage's Motion for a Preliminary Injunction (Oct. 06, 2003)
- 2003 WL 23335186 (Trial Motion, Memorandum and Affidavit) Response of Minnesota Public Utilities Commission to Vonage Motion for a Preliminary Injunction (Oct. 03, 2003)
- <u>2003 WL 23335190</u> (Trial Motion, Memorandum and Affidavit) Memorandum in Support of Vonage Holdings Corporation's Motion for Preliminary Injunction (Sep. 24, 2003)
- <u>0:03CV05287</u> (Docket) (Sep. 23, 2003)

END OF DOCUMENT

Exhibit 8

Press Release, Vonage Holdings Corp., Vonage Selects Xtens X-Pro As the SoftPhone of Choice (Mar. 23, 2004).



ABOUT US PRODUCTS PRESS ROOM EVENTS CAREERS CONTACT

Press Releases Product Review Print Broadcast Industry Research

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AWARDS

Press Room



Press Releases

Vonage® Selects Xten's X-Pro As The "Softphone Of Choice"

Vonage's cutting-edge Voice-over-IP service now available with X-PRO, the leading SIP Softphone from Xten

Edison, NJ, and Santa Clara, CA, March 23, 2004 - Vonage, the fastest growing telephony company in the US, and Xten Networks, publisher of the award winning X-PRO SoftPhone, announced today that Vonage and Xten have completed interoperability testing of an OEM version of Xten's X-PRO SIP SoftPhone for use on Vonage's Voice-over-IP (VoIP) service.

Vonage customers can now sign up for Vonage, download and install the Vonage X-PRO softphone, and start making and receiving telephone calls immediately on their computers, while maintaining the same quality of service they have come to expect.

"Road Warriors" using the Vonage X-PRO SoftPhone can access the Vonage service from almost any Internet connected personal computer. The Vonage X-PRO SoftPhone provides increased mobility of the Vonage service; this along with the feature-rich X-PRO's ease-of-use, make it a winning combination.

"We are really excited to partner with Xten to offer our customers the best SoftPhone on the market," said Michael Tribolet, Vonage's executive vice president of operations. "This partnership underscores our commitment to bringing the most cutting edge applications coupled with great features and prices to the consumer marketplace."

"VoIP services have come a long way since the mid-nineties and to see them replacing circuit-switched primary line services marks a new era for the telephone," said Erik Lagerway, cofounder and Chief Operating Officer of Xten Networks, Inc. "Xten is proud to have Vonage as a customer and we are excited about the opportunities this new partnership will foster."

The Vonage X-PRO SoftPhone is available for personal computers running Windows 98SE/NT/ME/2000/XP operating systems.

About Vonage®

Vonage is redefining communications by offering consumers and small businesses an affordable alternative to traditional

Contacts

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Connors Communications 212-798-1410 todd@connors.com

telephone service. The fastest growing telephony company in the US, Vonage's service area encompasses more than 1,900 active rate centers in over 113 US markets. Vonage is sold directly through www.vonage.com and retail partners such as Amazon.com and Circuit City. Wholesale partners such as EarthLink, ARMSTRONG®, Advanced Cable Communications and the Coldwater Board of Public Utilities resell the Vonage broadband phone service under their own unique brands. With more than 125,000 lines in service, Vonage continues to add more than 15,000 lines per month to its network. Over 5 million calls per week are made using Vonage, the easy-to-use, feature-rich, flat rate phone service. Vonage is headquartered in Edison, New Jersey. For more information about Vonage's products and services, please visit www.vonage.com or call 1-VONAGE-HELP. Vonage® is a trademark of Vonage Holdings Corp.

About Xten Networks, Inc.

Xten is a leading provider of award-winning, high-quality SIP (Session Initiation Protocol) Voice over Internet Protocol (VoIP) software and SIP softphones. It is Xten's goal to be the primary choice in softphones and client-side IP communications software for telephony software consumers the world over. Xten provides IP Telephony software products directly to end users, Enterprises, Next-Gen Service Providers (ITSPs & Tier 2), Wireless Internet Service Providers (WISPs), Telephone Companies (TELCOs), and Original Equipment Manufacturers (OEMs). Xten partners with Service Providers and the like to offer turnkey IP Telephony solutions. Those who are interested in Xten products should visit sales.xten.com. Xten is a private Nevada corporation located in Santa Clara, California. On the Web: www.xten.com.

Marketing Contacts

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Vonage | Vonage Corporate

Using the Vonage® mark and other Vonage Holdings Corp. intellectual property such as logos, slogans, trade dress, and graphic symbols on packaging, products, or services requires express written permission from Vonage Holdings Corp.

Use of confusingly similar or disparaging terms is a violation of our intellectual property rights.

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Exhibit 9

Vonage's Terms of Service

VONAGE TERMS OF SERVICE

These Terms of Service constitute the agreement ("Agreement") between Vonage Holdings Corp. (or, for Customers subscribing to services in Canada, Vonage Canada Corp.) ("we," "us" or "Vonage") and the user ("you," "user" or "Customer") of Vonage's enhanced Residential communications services or enhanced Small Business communications services and any related products or services ("Service"). This Agreement governs both the Service and any devices, such as an IP phone, Multimedia Terminal Adapter, Analog Telephone Adapter or any other IP connection device, ("Device" or "Equipment") used in conjunction with the Service. By activating the Service, you acknowledge that you have read and understood, and you agree, to the terms and conditions of this Agreement, and you represent that you are of legal age to enter this Agreement and become bound by its terms. If you have purchased Equipment from any Vonage retail dealer, you will be deemed a "Retail Customer" and will be governed by certain Retail Customer terms and conditions as set forth herein.

1. SERVICE

1.1 Term

Service is offered on a monthly basis for a term which begins on the date that Vonage activates your Service and ends on the day before the same date in the following month. Subsequent terms of this Agreement automatically renew on a monthly basis without further action by you unless you give Vonage written notice of non-renewal at least ten (10) days before the end of the monthly term in which the notice is given. You are purchasing the Service for full monthly terms, meaning that if you attempt to terminate Service prior to the end of a monthly term, you will be responsible for the full month's charges to the end of the then-current term, including without limitation unbilled charges, plus a disconnect fee, all of which immediately become due and payable. Expiration of the term or termination of Service does not excuse the Customer from paying all unpaid, accrued charges due in relation to the Agreement.

1.2.1 Residential Use of Service and Device

If you have subscribed to Vonage's Residential services, the Service and Device are provided to you as a residential user, for your personal, residential, non-business and non-professional use. This means that you are not using them for any commercial or governmental activities, profit-making or non-profit, including but not limited to home office, business, sales, tele-commuting, telemarketing (including without limitation charitable or political solicitation or polling), autodialing, continuous or extensive call forwarding, fax broadcast, fax blasting or any other activity that would be inconsistent with normal residential usage patterns. This also means that you are not to resell or transfer the Service or the Device to any other person for any purpose, or make any charge for the use of the Service, without express written permission from Vonage in advance. You agree that your use of the Service and/or Device, or the use of the Service and/or Device provided to you by any other person for any commercial or governmental purpose will obligate you to pay Vonage's higher rates for commercial service on account of all periods, including past periods, in which you use, or used, the Service for commercial or governmental purposes. Vonage reserves the right to immediately terminate or modify the Service, if Vonage

determines, in its sole discretion, that Customer's Service is being used for non-residential or commercial use

1.2.2 Small Business Use of Service and Device - Prohibition on Resale

If you have subscribed to Vonage's Small Business services, the Service and Device are provided to you as a small business user. This means that you are not to resell or transfer the service or device to any other person for any purpose, without express written permission from Vonage in advance. You agree that the Vonage Small Business Plans do not confer the right to use the service for auto-dialing, continuous or extensive call forwarding, telemarketing (including without limitation charitable or political solicitation or polling), fax broadcasting or fax blasting. Vonage reserves the right to immediately terminate or modify the Service, if Vonage determines, in its sole discretion, that Customer's Service is being used for any of the aforementioned activities.

1.3 Lawful Use of Service and Device

1.3.1 Prohibited Uses

You agree to use the Service and Device only for lawful purposes. This means that you agree not to use them for transmitting or receiving any communication or material of any kind when in Vonage's sole judgment the transmission, receipt or possession of such communication or material (i) would constitute a criminal offense, give rise to a civil liability, or otherwise violate any applicable local, state, national or international law or (ii) encourages conduct that would constitute a criminal offense, give rise to a civil liability, or otherwise violate any applicable local, state, national or international law. Vonage reserves the right to terminate your service immediately and without advance notice if Vonage, in its sole discretion, believes that you have violated the above restrictions, leaving you responsible for the full month's charges to the end of the current term, including without limitation unbilled charges, plus a disconnect fee, all of which immediately become due and payable and may at Vonage's discretion be immediately charged to your credit card. You are liable for any and all use of the Service and/or Device by yourself and by any person making use of the Service or Device provided to you and agree to indemnify and hold harmless Vonage against any and all liability for any such use. If Vonage, in its sole discretion believes that you have violated the above restrictions. Vonage may forward the objectionable material, as well as your communications with Vonage and your personally identifiable information to the appropriate authorities for investigation and prosecution and you hereby consent to such forwarding.

1.3.2 Use of Service and Device by Customers Outside the United States

While we encourage use of the Service within the United States to other countries, Vonage does not presently offer or support the Service to customers located in other countries except Canada. If you remove the Device to a country other than the United States or Canada and use the Service from there, you do so at your own sole risk, including the risk that such activity violates local laws in the country where you do so. You are liable for any and all such use of the Service and/or Device by yourself or any person making use of the Service or Device provided to you and agree to indemnify and hold harmless Vonage against any and all liability for any such use. Should the

removal from the United States or Canada of the Device violate any export control law or regulation, you will be solely liable for such violation and agree to indemnify and hold harmless Vonage against any and all liability for such violation. Vonage reserves the right to terminate your Service immediately and without advance notice if it determines that you are using it outside the United States or Canada.

1.4 Loss of Service Due to Power Failure or Internet Service Outage or Termination or Suspension or Termination by Vonage

You acknowledge and understand that the Service does not function in the event of power failure. You also acknowledge and understand that the Service requires a fully functional broadband connection to the Internet (which is not provided by Vonage) and that, accordingly, in the event of an outage of, or termination of service with or by, your Internet service provider ("ISP") and/or broadband provider, the Service will not function, but that you will continue to be billed for the Service unless and until you or Vonage terminate the Service in accordance with this Agreement. Should there be an interruption in the power supply or ISP outage, the Service will not function until power is restored or the ISP outage is cured. A power failure or disruption may require the Customer to reset or reconfigure equipment prior to utilizing the Service. Power disruptions or failures or ISP outages will also prevent dialing to emergency service numbers including the 911 calling feature. Should Vonage suspend or terminate your Service, the Service will not function until such time as Vonage restores your Service (which may require payment of all invoices and reconnection fees owed by you or cure of any breach by you of this Agreement).

1.5 Copyright / Trademark / Unauthorized Usage of Device, Firmware or Software

The Service and Device and any firmware or software used to provide the Service or provided to you in conjunction with providing the Service, or embedded in the Device, and all Services, information, documents and materials on Vonage's website(s) are protected by trademark, copyright or other intellectual property laws and international treaty provisions. All websites, corporate names, service marks, trademarks, trade names, logos and domain names (collectively "marks") of Vonage are and shall remain the exclusive property of Vonage and nothing in this Agreement shall grant you the right or license to use any of such marks. You acknowledge that you are not given any license to use the firmware or software used to provide the Service or provided to you in conjunction with providing the Service, or embedded in the Device, other than a nontransferable, revocable license to use such firmware or software in object code form (without making any modification thereto) strictly in accordance with the terms and conditions of this Agreement. You expressly agree that the Device is exclusively for use in connection with the Service and that Vonage will not provide any passwords, codes or other information or assistance that would enable you to use the Device for any other purpose. If you decide to use the Service through an interface device not provided by Vonage, which Vonage reserves the right to prohibit in particular cases or generally, you warrant and represent that you possess all required rights, including software and/or firmware licenses, to use that interface device with the Service and you will indemnify and hold harmless Vonage against any and all liability arising out of your use of such interface device with the Service. You shall not reverse compile, disassemble or reverse engineer or otherwise attempt to derive the source code from the binary code of the firmware or software.

1.6 Tampering with the Device or Service

You agree not to change the electronic serial number or equipment identifier of the Device, or to perform a factory reset of the Device, without express permission from Vonage in each instance which Vonage may deny in its sole discretion. Vonage reserves the right to terminate your Service should you tamper with the Device, leaving you responsible for the full month's charges to the end of the current term, including without limitation unbilled charges, plus a disconnect fee, all of which immediately become due and payable. You agree not to hack or disrupt the service or to make any use of the Service that is inconsistent with its intended purpose or to attempt to do so.

1.7 Theft of Service

You agree to notify Vonage immediately, in writing or by calling the Vonage customer support line, if the Device is stolen or if you become aware at any time that your Service is being stolen or fraudulently used. When you call or write, you must provide your account number and a detailed description of the circumstances of the Device theft or fraudulent use of Service. Failure to do so in a timely manner may result in the termination of your Service and additional charges to you. Until such time as Vonage receives notice of the theft or fraudulent use, you will be liable for all use of the Service using a Device stolen from you and any and all stolen Service or fraudulent use of the Service.

1.8 Return of Device

The Device may be returned to Vonage within fourteen (14) days of the termination of Service to receive a credit for the \$39.99 disconnect fee (refer to section 4.6 of this document regarding termination fees), provided: (i) you have retained, and return along with the Device, proof of purchase and original packaging; (ii) contents are undamaged and in original condition, reasonable wear and tear excluded; (iii) all parts, accessories, documentation and packaging materials are returned; and (iv) equipment is returned with a valid return authorization number obtained from Vonage's customer care department. You are responsible for the cost and risk of return shipping of equipment. If you receive cartons and/or Devices that are visibly damaged, you must note the damage on the carrier's freight bill or receipt and keep a copy. In such event, you must keep the original carton, all packing materials and parts intact in the same condition in which they were received from the carrier and contact Vonage's customer care department immediately. To obtain a return authorization number, you must contact billing@vonage.com or 1-VONAGE-HELP.

1.9 Number Transfer on Service Termination

Upon termination of the Service, Vonage may, at its sole discretion, release a telephone number that was ported in from a previous service provider to Vonage by you and used in connection with your Service provisioned by Vonage to your new service provider, if such new service provider is able to accept such number, and provided that (i) your account has been terminated; (ii) your Vonage account is completely current including payment for all charges and disconnect fees; and (iii) you request the transfer upon terminating your account.

1.10 Service Distinctions

You acknowledge and understand that the Service is not a telephone service. Important distinctions (some, but not necessarily all, of which are described in this Agreement) exist between telephone service and the enhanced Service offering provided by Vonage. The Service is subject to different regulatory treatment than telephone service. This treatment may limit or otherwise affect your rights of redress before Federal, State or Provincial telecommunications regulatory agencies.

1.11 Ownership and Risk of Loss

You shall be deemed the owner of the Device, and bear all risk of loss of, theft of, casualty to or damage to the Device, from the time it is shipped to you until the time (if any) when it is returned by you pursuant to Section 1.8 and has been received by Vonage.

1.12 No 0+ Calling; May Not Support x11 Calling

Vonage's Service does not support 0+ calling (including without limitation collect, third party billing or calling card calling). Vonage's Service may not support 311, 511 and/or other x11 (other than 911 and 411, which are provided for elsewhere in this Agreement) services in one or more (or all) service areas.

2. EMERGENCY SERVICES- 911 DIALING

2.1 Non-Availability of Traditional 911 or E911 Dialing Service

You acknowledge and understand that the Service does NOT support traditional 911 or E911 access to emergency services. Vonage does offer a limited 911-type service available only on Vonage Devices as described herein, but you acknowledge and understand that 911-type dialing is NOT automatic, that you must separately take affirmative steps, as described in this Agreement and on Vonage's website, to activate such 911-type dialing capabilities and that such 911-type dialing is different in a number of important ways (some, but not necessarily all, of which are described in this Agreement) from traditional 911 service. Vonage 911 dialing cannot be used in conjunction with a Vonage Soft Phone application and is only available on Vonage-certified Devices or Equipment. You agree to inform any household residents, guests and other third persons who may be present at the physical location where you utilize the Service of the non-availability of traditional 911 or E911 dialing from your Vonage Service and Device(s). If you activate Vonage 911-type dialing service, you agree to inform any household residents, guests and other third persons who may be present at the physical location where you utilize the Service as to the important differences and limitations of Vonage 911 dialing service as compared with traditional 911 or E911 dialing that are set forth in this Agreement.

2.2 Description of 911-Type Dialing Capabilities - Activation Required

Vonage does offer a 911-type dialing service in the U.S. (but may not offer such service in Canada) that is different in a number of important ways from traditional 911 service. You acknowledge and understand that 911-type dialing is NOT automatic. You must successfully activate the 911 dialing feature by following the instructions from the "Dial 911" link on your

dashboard. You acknowledge and understand that you cannot dial 911 from this line unless and until you have received a confirming email. Once you have received a confirming email that 911 dialing has been successfully activated, you may dial 911 as needed. When you dial 911, your call is routed from the Vonage network to the Public Safety Answering Point (PSAP) or local emergency service personnel designated for the address that you listed at the time of activation. You acknowledge and understand that when you dial 911 from your Vonage equipment it is intended that you will be routed to the general telephone number for the PSAP or local emergency service provider (which may not be answered outside business hours), and may not be routed to the 911 dispatcher(s) who are specifically designated to receive incoming 911 calls using traditional 911 dialing. Vonage relies on third parties for the forwarding of information underlying such routing, and accordingly Vonage and its third party provider(s) disclaim any and all liability or responsibility in the event such information or routing is incorrect. As described herein, this 911-type dialing currently is NOT the same as traditional 911 or E911 dialing, and at this time, does not necessarily include all of the capabilities of traditional 911 dialing. Neither Vonage nor its officers or employees may be held liable for any claim, damage, or loss, and you hereby waive any and all such claims or causes of action, arising from or relating to 911 dialing unless it is proven that the act or omission proximately causing the claim, damage, or loss constitutes gross negligence, recklessness, or intentional misconduct on the part of Vonage. You agree to indemnify and hold harmless Vonage and its third party provider from any claim or action arising out of misroutes of 911 calls, including but not limited to your failure to follow correct activation procedures for 911 calling or your provision to Vonage of incorrect information in connection therewith.

2.3 Service Outage

2.3.1 Power Failure or Disruption

You acknowledge and understand that 911 dialing does not function in the event of a power failure or disruption. Should there be an interruption in the power supply, the Service and 911 dialing will not function until power is restored. A power failure or disruption may require the Customer to reset or reconfigure equipment prior to utilizing the Service or 911 dialing.

2.3.2 Broadband Service / ISP Outage or Termination / Suspension or Termination by Vonage

You acknowledge and understand that service outages or suspension or termination of service by your broadband provider and/or ISP or by Vonage will prevent ALL Service including 911 dialing.

2.3.3 Service Outage Due to Suspension of Your Account

You acknowledge and understand that service outages due to suspension of your account as a result of billing issues will prevent ALL Service, including 911dialing.

2.3.4 Other Service Outages

You acknowledge and understand that if there is a service outage for ANY reason, such outage will prevent ALL Service, including 911 dialing. Such outages may occur for a variety of reasons, including, but not limited to those reasons described elsewhere in this Agreement.

2.3.5 Limitation of Liability and Indemnification

You acknowledge and understand that Vonage's liability is limited for any Service outage and/or inability to dial 911 from your line or to access emergency service personnel, as set forth in this document. You agree to defend, indemnify, and hold harmless Vonage, its officers, directors, employees, affiliates and agents and any other service provider who furnishes services to Customer in connection with this Agreement or the Service, from any and all claims, losses, damages, fines, penalties, costs and expenses (including, without limitation, reasonable attorneys fees) by, or on behalf of, Customer or any third party or user of Customer's Service relating to the absence, failure or outage of the Service, including 911 dialing and/or inability of Customer or any third person or party or user of Customer's Service to be able to dial 911 or to access emergency service personnel.

2.4 911 Dialing Requires Activation

You acknowledge and understand that 911 dialing does not function unless you have successfully activated the 911dialing feature by following the instructions from the "Dial 911" link on your dashboard, and until such later date that such activation has been confirmed to you through a confirming email. You acknowledge and understand that you cannot dial 911 from this line unless and until you have received a confirming email.

2.5 Failure to Designate the Correct Physical Address When Activating 911 Dialing

Failure to provide the current and correct physical address and location of your Vonage equipment by following the instructions from the "Dial 911" link on your dashboard will result in any 911 communication you may make being routed to the incorrect local emergency service provider. This must be the actual physical street address where you are located, not a post office box, mail drop or similar address.

2.6 Requires Re-Activation if You Change Your Number or Add or Port New Numbers

You acknowledge and understand that 911 dialing does not function if you change your phone number or (for such newly added or ported numbers) if you add or port new numbers to your account, unless and until you have successfully activated the 911 dialing feature for your changed, newly added or newly ported number by following the instructions from the "Dial 911" link on your dashboard, and until such later date that such activation has been confirmed to you through a confirming email. Although you may have activated 911 dialing with your former Vonage phone number, you must separately activate 911 dialing for any changed or newly added or ported number.

2.7 Requires Re-Activation if You Move or Change Location

You acknowledge and understand that 911 dialing does not function properly or at all if you move or otherwise change the physical location of your Vonage Device to a different street address, unless and until you have successfully activated the 911 dialing feature following the instructions from the "Dial 911" link on your dashboard, and until such later date that such activation has been confirmed to you through a confirming email. 911 dialing must be reactivated although you may have activated 911 dialing using your former address, and you must separately activate 911 dialing for any new physical address. Failure to provide the current and correct physical address and location of your Vonage equipment will result in any 911 dialing you may make being routed to the incorrect local emergency service provider

2.8 Possibility of Network Congestion and/or Reduced Speed for Routing or Answering 911

Due to the technical constraints on the manner in which it is possible to provide the 911 dialing feature for Vonage Service at this time, you acknowledge and understand that there is a greater possibility of network congestion and/or reduced speed in the routing of a 911 communication made utilizing your Vonage equipment as compared to traditional 911 dialing over traditional public telephone networks. You acknowledge and understand that 911 dialing from your Vonage equipment will be routed to the general telephone number for the local emergency service provider (which may not be answered outside business hours), and will not be routed to the 911 dispatcher(s) who are specifically designated to receive incoming 911 calls at such local provider's facilities when such calls are routed using traditional 911 dialing. You acknowledge and understand that there may be a greater possibility that the general telephone number for the local emergency service provider will produce a busy signal or will take longer to answer, as compared to those 911 calls routed to the 911 dispatcher(s) who are specifically designated to receive incoming 911 calls using traditional 911 dialing. You acknowledge and accept that Vonage relies on third parties for the forwarding of information underlying such routing, and accordingly Vonage and its third party provider(s) disclaim any and all liability or responsibility in the event such information or routing is incorrect. Vonage or its officers or employees, may not be held liable for any claim, damage, or loss, and you hereby waive any and all such claims or causes of action, arising from or relating to 911 dialing unless it is proven that the act or omission proximately causing the claim, damage, or loss constitutes gross negligence, recklessness, or intentional misconduct on the part of Vonage.

2.9 Automated Number Identification

At this time in the technical development of Vonage 911 dialing, it may or may not be possible for the Public Safety Answering Point (PSAP) and the local emergency personnel to identify your phone number when you dial 911. Vonage's system is configured in most instances to send the automated number identification information; however, one or more telephone companies, not Vonage, route the traffic to the PSAP and the PSAP itself must be able to receive the information and pass it along properly, and PSAPs are not yet always technically capable of doing so. You acknowledge and understand that PSAP and emergency personnel may or may not be able to identify your phone number in order to call you back if the call is unable to be completed, is dropped or disconnected, or if you are unable to speak to tell them your phone

number and/or if the Service is not operational for any reason, including without limitation those listed elsewhere in this Agreement.

2.10 Automated Location Identification

At this time in the technical development of Vonage 911 Dialing, it is not possible to transmit identification of the address that you have listed to the Public Safety Answering Point (PSAP) and local emergency personnel for your area when you dial 911. You acknowledge and understand that you will need to state the nature of your emergency promptly and clearly, including your location, as PSAP and emergency personnel will NOT have this information. You acknowledge and understand that PSAP and emergency personnel will not be able to find your location if the call is unable to be completed, is dropped or disconnected, if you are unable to speak to tell them your location and/or if the Service is not operational for any reason, including without limitation those listed elsewhere in this Agreement.

2.11 Alternative 911 Arrangements

You acknowledge that Vonage does not offer primary line or lifeline services. You should always have an alternative means of accessing traditional E911 services.

3. CHANGES TO THIS AGREEMENT

Vonage may change the terms and conditions of this Agreement from time to time. Notices will be considered given and effective on the date posted on to the "Service Announcements" section of Vonage's website (currently located at http://www.vonage.com/features_terms_service.php). Such changes will become binding on Customer, on the date posted to the Vonage website and no further notice by Vonage is required. This Agreement as posted supersedes all previously agreed to electronic and written terms of service, including without limitation any terms included with the packaging of the Device and also supersedes any written terms provided to Retail Customers in connection with retail distribution, including without limitation any written terms enclosed within the packaging of the Device..

4. CHARGES / PAYMENTS / DEFAULT / TAXES / TERMINATION

4.1 Billing

You must give us a valid credit card number (Visa, MasterCard, Discover, American Express or any other issuer then-accepted by Vonage) when the Service is activated. Vonage reserves the right to stop accepting credit cards from one or more issuers. If the card expires, you close your account, your billing address changes, or the card is cancelled and replaced owing to loss or theft, you must advise Vonage at once. We will bill all charges, applicable taxes and surcharges monthly in advance (except for usage-based charges, which will be billed monthly in arrears, and any other charges which Vonage decides to bill in arrears) to your credit card, including but not limited to: activation fees, monthly Service fees, international usage charges, advanced feature charges, equipment purchases, disconnect fees and shipping and handling charges. Vonage reserves the right to bill at more frequent intervals if the amount due at any time exceeds \$50. Any usage charges will be billed in increments that are rounded up to the nearest minute except as otherwise set forth in the rate schedules found on Vonage's website.

4.2 Billing Disputes

You must notify Vonage in writing within 7 days after receiving your credit card statement if you dispute any Vonage charges on that statement or such dispute will be deemed waived. Billing disputes should be notified to the following address:

Customer Care Billing Department Vonage Holdings 2147 Route 27 Edison, NJ 08817 or billing@vonage.com or 1-VONAGE-HELP

4.3 Payment

Vonage accepts payments only by credit card as set forth in Section 4.1. Your initial use of the Service authorizes Vonage to charge the credit card account number on file with Vonage, including any changed information given Vonage if the card expires or is replaced, or if you substitute a different card, for Vonage charges as set forth in Section 4.1. This authorization will remain valid until 30 days after Vonage receives your written notice terminating Vonage's authority to charge your credit card, whereupon Vonage will charge you the disconnect fee and any other outstanding charges and terminate the Service. Vonage may terminate your Service at any time in its sole discretion, if any charge to your credit card on file with Vonage is declined or reversed, your credit card expires and you have not provided Vonage with a valid replacement credit card or in case of any other non-payment of account charges. Termination of Service for declined or expired card, reversed charges or non-payment leaves you FULLY LIABLE to Vonage for ALL CHARGES ACCRUED BEFORE TERMINATION and for all costs incurred by Vonage in collecting such amounts, such as (but not limited to) collection costs and attorney's fees.

4.4 Termination/Discontinuance of Service

Vonage reserves the right to suspend or discontinue providing the Service generally, or to terminate your Service, at any time in its sole discretion. If Vonage discontinues providing the Service generally, or terminates your Service in its discretion without a stated reason, you will only be responsible for charges accrued through the date of termination, including a pro-rated portion of the final month's charges. If your Service is terminated for any stated reason, including without limitation violation of this Agreement, or because of any improper use of the Service or Device (such as, but not limited to, your attempts to hack, disrupt, or misuse the Service or your acts or omissions that violate any acceptable use policy of Vonage or of a third party provider to which Vonage is subject), you will be responsible for the full month's charges to the end of the current term, including without limitation unbilled charges, plus the disconnect fee set forth in Section 4.6, all of which immediately become due and payable.

4.5 Taxes

You are responsible for, and shall pay, any applicable federal, state, provincial, municipal, local or other governmental sales, use, excise, value-added, personal property, public utility or other taxes, fees or charges now in force or enacted in the future, that arise from or as a result of your subscription or use or payment for the Service or a Device. Such amounts are in addition to payment for the Service or Devices and will be billed to your credit card as set forth in this Agreement. If you are exempt from payment of such taxes, you shall provide Vonage with an original certificate that satisfies applicable legal requirement attesting to tax-exempt status. Tax exemption will only apply from and after the date Vonage receives such certificate.

4.6 Disconnect Fee

Customer will be charged a disconnect fee of \$39.99 per voice line upon termination of Service for any reason or for convenience by Customer. The disconnect fee becomes due and payable immediately upon termination and will billed directly to Customer's credit card. If Customer has multiple lines, Customer will be charged a disconnect fee of \$39.99 per line for each line disconnected. To receive a credit for the disconnect fee, Customer must return the Device(s) undamaged and in original condition within fourteen (14) days of termination as set forth in Section 1.8. Vonage will not credit Customer if the Device(s) is damaged or not in its original condition as received by the Customer or if Customer has otherwise failed to comply fully with the requirements of Section 1.8. In the event Customer disconnects multiple lines, Vonage will issue Customer a credit for all disconnect fees upon receipt of all Devices (including without limitation Multimedia Terminal Adapters) in accordance with this Section and Section 1.8.

4.7 Money Back Guarantee; Limitations and Conditions

Vonage offers a 14-day Money Back Guarantee (30 or 90 days for Retail Customers; see offer details in advertising or online content of the retailer from whom Retail Customer purchased Equipment for the applicable time period) (such 14, 30 or 90 day period, the "Warranty Period"), applicable only to User's first-ordered line per account, not to additional or secondary lines. Under terms of this Money Back Guarantee, Vonage refunds the activation fee, first month of service, and shipping charges and waives the disconnect fee, provided the terms described below are satisfied. Federal excise taxes and any other applicable taxes cannot be refunded. Vonage reserves the right to terminate or revoke this Money Back Guarantee at any time, without prior notice.

In order to be entitled to this Money Back Guarantee, User (i) must cancel service within the number of days in the Warranty Period after the account activation; (ii) must return all Devices within 14 days after cancellation pursuant to Sections 1.8 and 4.6; and (iii) must not have exceeded 250 minutes of usage (500 minutes for Retail Customers). User remains responsible for any charges for domestic usage in excess of the amount included within the Plan to which User subscribes, international usage (including the charges described in Section 4.9), payphone calls to Vonage toll free numbers and directory assistance. THIS MONEY BACK GUARANTEE DOES NOT APPLY TO ACCOUNTS EXCEEDING 250 MINUTES (500 MINUTES FOR RETAIL CUSTOMERS) OF USAGE AND SUCH ACCOUNTS ARE NOT ELIGIBLE FOR REFUND OF ANY OF THE CHARGES DESCRIBED HEREIN.

In addition to the requirements set forth in Section 1.8, all returned Devices must be in the original packaging with the UPC or bar code intact. All components, manuals and registration card(s) must be included. Equipment must be returned with a valid return authorization number obtained from Vonage customer care. User is responsible for the cost and risk of return shipping of equipment. THE MONEY BACK GUARANTEE WILL NOT BE HONORED IF USER FAILS TO MEET ALL SUCH REQUIREMENTS.

To obtain a return authorization number, User must contact billing@vonage.com or 1-VONAGE-HELP.

4.8 Payphone Charges

If you make use of Vonage's Toll Free Plus feature any toll free feature that may be offered by Vonage in the future, you acknowledge and agree that Vonage is entitled to recover from you any charges imposed on Vonage by payphone owners or operators, either directly or indirectly through Vonage's suppliers in connection with toll free calls made to your number, or any charges imposed on Vonage by its suppliers to recover such costs. Vonage may recover these amounts by means of a per-call charge, rounded up to the next cent, or in such other fashion as Vonage deems appropriate for the recovery of these costs.

4.9 Charges for Directory Calls

Vonage will charge 99 cents for each call made to Vonage directory assistance.

5. WARRANTY and LIABILITY LIMITATIONS / INDEMNIFICATION

5.1 Limitation of Liability

Vonage shall not be liable for any delay or failure to provide the Service, including 911 dialing, at any time or from time to time, or any interruption or degradation of voice quality that is caused by any of the following:

- 1.) act or omission of an underlying carrier, service provider, vendor or other third party;
- 2.) equipment, network or facility failure;
- 3.) equipment, network or facility upgrade or modification;
- 4.) force majeure events such as (but not limited to) acts of god; strikes; fire; war; riot; government actions;
- 5.) equipment, network or facility shortage;
- 6.) equipment or facility relocation;
- 7.) service, equipment, network or facility failure caused by the loss of power to Customer;
- 8) outage of Customer's ISP or broadband service provider;

- 9) act or omission of Customer or any person using the Service or Device provided to Customer; or
- 10) any other cause that is beyond Vonage's control, including without limitation a failure of or defect in any Device, the failure of an incoming or outgoing communication, the inability of communications (including without limitation 911 dialing) to be connected or completed, , or degradation of voice quality.

Vonage's aggregate liability for (i) any failure or mistake; (ii) any claim with respect to Vonage's performance or nonperformance hereunder or (iii) any Vonage act or omission in connection with the subject matter hereof shall in no event exceed Service charges with respect to the affected time period.

5.2 Disclaimer of Damages

IN NO EVENT SHALL VONAGE, ITS OFFICERS, DIRECTORS, EMPLOYEES, AFFILIATES OR AGENTS OR ANY OTHER SERVICE PROVIDER WHO FURNISHES SERVICES TO CUSTOMER IN CONNECTION WITH THIS AGREEMENT OR THE SERVICE BE LIABLE FOR ANY DIRECT, INCIDENTAL, INDIRECT, SPECIAL, PUNITIVE, EXEMPLARY OR CONSEQUENTIAL DAMAGES, OR FOR ANY OTHER DAMAGES, INCLUDING BUT NOT LIMITED TO LOSS OF DATA, LOSS OF REVENUE OR PROFITS, OR DAMAGES ARISING OUT OF OR IN CONNECTION WITH THE USE OR INABILITY TO USE THE SERVICE, INCLUDING INABILITY TO BE ABLE TO DIAL 911 OR TO ACCESS EMERGENCY SERVICE PERSONNEL THROUGH THE SERVICE. THE LIMITATIONS SET FORTH HEREIN APPLY TO CLAIMS FOUNDED IN BREACH OF CONTRACT, BREACH OF WARRANTY, PRODUCT LIABILITY, TORT AND ANY AND ALL OTHER THEORIES OF LIABILITY AND APPLY WHETHER OR NOT VONAGE WAS INFORMED OF THE LIKELIHOOD OF ANY PARTICULAR TYPE OF DAMAGES.

5.3 Indemnification

Customer agrees to defend, indemnify, and hold harmless Vonage, its officers, directors, employees, affiliates and agents and any other service provider who furnishes services to Customer in connection with this Agreement or the Service, from any and all claims, losses, damages, fines, penalties, costs and expenses (including, without limitation, reasonable attorneys fees) by, or on behalf of, Customer or any third party or user of Customer's Service, relating to this Agreement, the Services, including 911dialing, or the Device. This paragraph shall survive termination of this Agreement.

5.4 No Warranties on Service

VONAGE MAKES NO WARRANTIES, EXPRESS OR IMPLIED, INCLUDING BUT NOT LIMITED TO, ANY IMPLIED WARRANTIES OF MERCHANTABILITY, FITNESS OF THE SERVICE FOR A PARTICULAR PURPOSE, TITLE OR NON-INFRINGEMENT OR ANY WARRANTY ARISING BY USAGE OF TRADE, COURSE OF DEALING OR COURSE OF PERFORMANCE OR ANY WARRANTY THAT THE SERVICE WILL MEET CUSTOMER'S REQUIREMENTS. WITHOUT LIMITING THE FOREGOING, VONAGE

DOES NOT WARRANT THAT THE SERVICE WILL BE WITHOUT FAILURE, DELAY, INTERRUPTION, ERROR, DEGRADATION OF VOICE QUALITY OR LOSS OF CONTENT, DATA OR INFORMATION. NEITHER VONAGE NOR ITS OFFICERS, DIRECTORS, EMPLOYEES, AFFILIATES OR AGENTS OR ANY OTHER SERVICE PROVIDER OR VENDOR WHO FURNISHES SERVICES OR PRODUCTS TO CUSTOMER IN CONNECTION WITH THIS AGREEMENT OR THE SERVICE WILL BE LIABLE FOR UNAUTHORIZED ACCESS TO VONAGE'S OR CUSTOMER'S TRANSMISSION FACILITIES OR PREMISES EQUIPMENT OR FOR UNAUTHORIZED ACCESS TO, OR THEFT OR DESTRUCTION OF, CUSTOMER'S DATA FILES, ALTERATION, PROGRAMS, **PROCEDURES INFORMATION THROUGH** OR ACCIDENT, FRAUDULENT MEANS OR DEVICES OR ANY OTHER METHOD, REGARDLESS OF WHETHER SUCH DAMAGE OCCURS AS A RESULT OF VONAGE'S OR ITS SERVICE PROVIDER'S OR VENDORS' NEGLIGENCE. STATEMENTS AND DESCRIPTIONS CONCERNING THE SERVICE OR DEVICE, IF ANY, BY VONAGE OR VONAGE'S AGENTS OR INSTALLERS ARE INFORMATIONAL AND ARE NOT GIVEN AS A WARRANTY OF ANY KIND.

5.5 No Warranties, or Limited Warranties, for Devices

If Customer received the Device new from Vonage and the Device included a limited warranty at the time of receipt, Customer must refer to the separate limited warranty document provided with the Device for information on the limitation and disclaimer of certain warranties. Remedies for breach of any such warranties will be limited to those expressly set forth in such documentation. If Customer's Device did not include a limited warranty from Vonage at the time of receipt, Customer agrees that it accepts its Device "as is" and that Customer is not entitled to replacement or refund in the event of any defect, except that for Retail Customers only, Vonage will provide a limited warranty on the Device as to manufacturing defects only for a period of one (1) year from the date of purchase. This Retail Customer limited warranty shall not apply to any defect or failure other than a manufacturing defect, and, without limiting the generality of the foregoing, shall not apply to any defect caused by damage in transit, retailer handling or Retail Customer handling. Retail Customer's sole remedy for any breach of this Retail Customer limited warranty is to obtain a repaired or replacement Device, by following the return procedures set forth in Section 1.8. Retail Customer must include with the returned Device a letter stating that the Retail Customer is returning the Device for warranty repair or replacement and stating the nature of the defect. This Retail Customer limited warranty shall also apply in lieu of the limited warranty included with the Device if such included limited warranty is less favorable to Retail Customer than that contained herein.. OTHER THAN WARRANTIES AS TO THE DEVICE EXPRESSLY SET FORTH IN DOCUMENTATION PROVIDED WITH THE DEVICE AND THE RETAIL CUSTOMER LIMITED WARRANTY EXPRESSLY SET FORTH HEREIN, VONAGE MAKES NO WARRANTIES OF ANY KIND, EXPRESS OR **SPECIFICALLY DISCLAIMS** IMPLIED, **AND ANY** WARRANTY MERCHANTABILITY, FITNESS OF THE DEVICE FOR A PARTICULAR PURPOSE, TITLE OR NON-INFRINGEMENT OR ANY WARRANTY ARISING BY USAGE OF TRADE, COURSE OF DEALING OR COURSE OF PERFORMANCE OR ANY WARRANTY THAT THE, DEVICE OR ANY FIRMWARE OR SOFTWARE IS "ERROR FREE" OR WILL MEET CUSTOMER'S REQUIREMENTS. THE FOREGOING WILL NOT

BE DEEMED TO LIMIT ANY DISCLAIMER OR LIMITATION OF WARRANTY SET FORTH IN THE DOCUMENTATION PROVIDED WITH THE DEVICE.

5.6 No Third Party Beneficiaries

No provision of this Agreement provides any person or entity not a party to this Agreement with any remedy, claim, liability, reimbursement, or cause of action or creates any other third party beneficiary rights.

5.7 Content

You are liable for any and all liability that may arise out of the content transmitted by or to you or Users using the Services. You shall assure that your or User's use of the Services and content will at all times comply with all applicable laws, regulations and written and electronic instructions for use. Vonage reserves the right to terminate or suspend affected Services, and/or remove your or Users' content from the Services, if Vonage determines that such use or content doer not conform with the requirements set forth in this Agreement or interferes with Vonage's ability to provide Services to you or others or receives notice from anyone that your or Users' use or Content may violate any laws or regulations. Vonage's actions or inaction under this Section shall not constitute review or approval of your or Users' use or Content. You will indemnify and hold Vonage against any and all liability arising from the content transmitted by or to you or to Users using the Services. A "User" means any person, whether authorized or unauthorized, using the Service and/or Device provided to you.

6. GOVERNING LAW / RESOLUTION OF DISPUTES

6.1 Mandatory Arbitration

Any dispute or claim between Customer and Vonage arising out of or relating to the Service or Device provided in connection with this Agreement shall be resolved by arbitration before a single arbitrator administered by the American Arbitration Association in accordance with its Commercial Arbitration Rules (or, for Customers subscribing to service in Canada, a Canadian arbitration organization of Vonage's choosing). The arbitration shall take place in New York, New York (or, for Customers subscribing to service in Canada, Toronto, Ontario) and shall be conducted in English. The arbitrator's decision shall follow the plain meaning of the relevant documents, and shall be final and binding. Without limiting the foregoing, the parties agree that no arbitrator has the authority to: (i) award relief in excess of what this Agreement provides; or (ii) award punitive or exemplary damages. Judgment on the award rendered by the arbitrators may be entered in any court having jurisdiction thereof. All claims shall be arbitrated individually and Customer will not bring, or join any class action of any kind in court or in arbitration or seek to consolidate or bring previously consolidated claims in arbitration. CUSTOMER ACKNOWLEDGES THAT THIS ARBITRATION PROVISION CONSTITUTES A WAIVER OF ANY RIGHT TO A JURY TRIAL.

6.2 Governing Law

The Agreement and the relationship between you and Vonage shall be governed by the laws of the State of New Jersey (or, for Customers subscribing to service in Canada, applicable Canadian law) without regard to its conflict of law provisions. To the extent court action is initiated to enforce an arbitration award or for any other reason consistent with Section 6.1, you and Vonage agree to submit to the personal and exclusive jurisdiction of the courts located within the state of New Jersey (or, for Customers subscribing to service in Canada, courts sitting within the province of Ontario) and waive any objection as to venue or inconvenient forum. The failure of Vonage to exercise or enforce any right or provision of the Agreement shall not constitute a waiver of such right or provision. If any provision of the Agreement is found by a court of competent jurisdiction to be invalid, the parties nevertheless agree that the court should endeavor to give effect to the parties' intentions as reflected in the provision, and the other provisions of the Agreement remain in full force and effect. You agree that regardless of any statute or law to the contrary, any claim or cause of action arising out of or related to use of the Service or the Agreement must be filed within one (1) year after such claim or cause of action arose or be forever barred.

6.3 Entire Agreement

This Agreement and the rates for Services found on Vonage's website constitute the entire agreement between you and Vonage and govern your use of the Service, superseding any prior agreements between you and Vonage and any and all prior or contemporaneous statements, understandings, writings, commitments, or representations concerning its subject matter. No amendment to this Agreement shall be binding upon Vonage unless and until posted in accordance with Section 3 hereof.

6.4 Severability

If any part of this Agreement is legally declared invalid or unenforceable, all other parts of this Agreement are still valid and enforceable. Such invalidity or non-enforceability will not invalidate or render unenforceable any other portion of this Agreement.

7. PRIVACY

Vonage Service utilizes, in whole or in part, the public Internet and third party networks to transmit voice and other communications. Vonage is not liable for any lack of privacy which may be experienced with regard to the Service. Please refer to our Privacy Policy applicable to you at www.vonage.com for additional information.

Last Updated: April 27, 2004

Exhibit 10

Vonage's 911 Primer

Vonage's Emergency Calling Service: A Description of the Service, its Limitations, and Vonage's Disclosures to its Customers

Prior to Vonage's entry onto the market two years ago, no attention was given to VoIP emergency calling. Vonage, nonetheless, undertook to provide a form of emergency calling that would permit its customers to access emergency services by dialing the familiar digits, "911." Vonage did so because it anticipated that that the market would require providers to offer this service in order to compete. In developing the solution, Vonage engaged Intrado, a company with 25 years of experience providing 911 services. As a result, Vonage has been hailed as the industry leader in developing VoIP 911 solutions and is committed to the development of a VoIP 911 system that is every bit as robust and feature-laden as that offered on the PSTN. Indeed, as VoIP and the delivery of Internet-based services develops, Vonage anticipates the development of information-rich "i-911" services, which will provide public safety responders with, among other things, health records and floor plans before arriving on the scene of an incident.

Vonage is also a signatory to an agreement with the National Emergency Number Association ("NENA") on VoIP 911 implementation, and is actively involved in industry efforts to overcome the technological hurdles that currently prevent seamless compatibility between current 911 systems and VoIP-based emergency calling services. Thus, Vonage is constantly working to improve the service, and is currently involved in trials in Minnesota, Florida, Rhode Island, Texas and Washington.

In addition to its agreement with NENA on 911 implementation, Vonage is working directly with that organization and others to set standards for a next generation IP enabled 911 system. Vonage's CEO has also testified before Congress and participated in two FCC "Solution Summits" regarding national solutions for VoIP 911.

Nonetheless, because of the technical limitations of current IP networks and the legacy PSTN infrastructure, Vonage is not currently able to offer the same forms of 911 access offered by local wireline telephone companies. Although Vonage, via its telecommunications providers, is capable of routing calls to the publicly available administrative number of the local PSAP, Vonage is unable to provide traditional E911 for several reasons. First, unlike in a fixed PSTN configuration, Vonage's customers can connect to any broadband Internet connection; as a result of the mobility of the service and the geographically-agnostic nature of IP networks, Vonage can not automatically determine the location of the caller or transmit the location information directly to the PSAP. This limitation also restricts Vonage's ability to facilitate automated call routing. Furthermore, the current capabilities of Vonage's Internet-based "911" solution are also limited by the existing PSTN infrastructure. Much of this emergency calling infrastructure is incapable of routing or handling IP based communications and routing out-of-region calls.

The first part of this submission reviews the technical limitations currently inherent in Vonage's Internet-based "911" solution. The second part reviews the extraordinary measures Vonage takes to ensure that its customers understand those limitations.

I. Vonage's 911 Service

To understand the 911 calling issues confronting Vonage and other VoIP providers, it is helpful to consider how traditional, land-line telephone 911 calling works. When an end-user on the public switched telephone network ("PSTN") places a 911 call, the Class 5 switch (or its equivalent) controlling that end-user's service automatically routes the call to the appropriate 911 tandem switch (called a 911 Tandem or Selective Router ("SR")), which, in turn, routes the call along dedicated trunks to the public safety answering point ("PSAP") designated to serve that end-user. Intrado maps the customer to the appropriate PSAP based on the physical address the

customer provides, which can be changed if the customer chooses to access the service from a different location.

Most PSAPs today are equipped with advanced computer equipment capable of utilizing the Automatic Location Identification ("ALI") and Automatic Number Identification ("ANI") that is routed with the call. That information facilitates emergency response and follow-up, when necessary. Indeed, "E911" service is characterized by the routing of ANI and ALI information to the PSAP.

This system has been developed over several decades and works well for land-line phones, which are fixed at the end of "local loops," which are themselves connected to centralized switching equipment operated by local telephone companies. Developing 911 and E911 calling for networks other than the PSTN has proved difficult and time consuming. For example, the FCC did not begin to consider providing E911 calling capability for wireless calls until 1994, and implementation of wireless 911 calling is still underway.

Because Vonage customers are not directly connected to this PSTN infrastructure, Vonage cannot provide dedicated E911 calling for many of the same reasons that wireless providers could not provide that service until just recently. First, because Vonage customers are connected to the Internet, not to the PSTN, the automatic, dedicated call routing functionality that routes PSTN 911 calls directly to the PSAP, and transmits ANI and ALI information, is not available to Vonage. And because Vonage customers access the service over the Internet, Vonage cannot determine the geographic location of its 911 callers, nor can the appropriate PSAP automatically be identified based on the Vonage customer's exchange because those exchanges are not associated with fixed geographic areas.

As the Commission is aware, calls initiated by Vonage customers are aggregated on one of Vonage's Internet servers, where they are then handed off to regulated telecommunications carriers (either interexchange carriers or competitive local exchange carriers) who route the call to the designated PSTN telephone number. Thus, 911 calls placed by Vonage customers are not routed over dedicated circuits to the PSAP, but are instead routed over the PSTN by a CLEC to the appropriate PSAP's 10-digit phone number. Also, because calls made using Vonage's service are not routed over E911 dedicated trunks, Vonage can not currently provide ALI or ANI to the PSAP operator.¹

Finally, Vonage has different quality-of-service characteristics than traditional PSTN calling. For example, although many customers have power back-up capabilities, Vonage's service primarily depends on the electric power provided by the local electric utility and on the Internet connection provided by the Vonage customer's broadband ISP, neither of which Vonage controls.

II. Vonage Fully Discloses The Limitations of its 911 Calling Service to Customers

Vonage fully discloses the limitations of its 911 service, and ensures that customers are fully aware of those limitations by explaining them at three separate points when a new subscriber joins Vonage. A Vonage subscriber cannot sign up for service without explicitly and affirmatively accepting or declining 911 services. Moreover, Vonage's Terms of Service (TOS) explain the 911 offering in extensive detail. This section explains the information that Vonage provides its customers regarding its 911 service.

¹ ANI information is, however, transmitted to the PSAP administrative number when a call is routed to such a station.

A. Vonage's Terms of Service

When a new customer signs up for service, he or she is navigated through a series of screens on the Internet where various information is collected. On the third screen of the sign-up process, the prospective customer encounters Vonage's TOS, to which each customer must affirm agreement before continuing on with the sign-up process.² Section 2 of the TOS, titled "Emergency Services – 911 Dialing," devotes four pages to describing the service in great detail. Because of its length, the section of the TOS devoted to 911 calling is attached as an appendix. (See attachment 1.) This section summarizes the disclosures found in the TOS.

Non-Availability of Traditional 911 or E911 Dialing Service – The first section (§ 2.1) of the 911 TOS explains:

- 1. that Vonage's service does NOT support traditional 911 or E911 access to emergency services and is different from traditional 911 in several important ways (many, but not all of which, are disclosed in the TOS);
- 2. that the service is available only on certain Vonage devices (e.g., not softphones);
- 3. that Vonage's 911 dialing service is NOT automatic -e.g., that customers must take affirmative steps to activate 911-type dialing capabilities;
- 4. that customers should "inform any household residents, guests and other third persons who may be present at the physical location where you utilize the Service of the non-availability of traditional 911 or E911 dialing from your Vonage Service and Device(s)."

<u>Description of 911-Type Dialing Capabilities - Activation Required</u> – This section (§ 2.2) of the TOS emphasizes, again, that customers must affirmatively activate the service by providing Vonage with certain information, and explains in detail the differences between Vonage's service and traditional E911 service. This section explains:

² See https://subscribe.vonage.com/vonage-subscribe/subscribe/subscribe/step0.do. The TOS can also be accessed via a link on the Home page of Vonage's website, without going through the sign-up process.

- 1. that the customer must "successfully activate the 911 dialing feature by following the instructions from the 'Dial 911' link on the customer's Internet "dashboard," and that the service cannot be activated until the customer receives a confirming email;
- 2. that there are certain technical differences between Vonage's 911 service and traditional 911, including the following:
 - a. that Vonage's routing of 911 calls to the PSAP is based on information provided by the customer (*e.g.*, Vonage cannot automatically determine the appropriate PSAP);
 - b. that Vonage customers' 911 calls are not necessarily routed to the same PSAP that answers regular PSTN 911 calls; the TOS also explain (§ 2.8) that Vonage emergency calls are often routed to the "general telephone number for the local emergency service provider," and that, as a consequence, "there may be a greater possibility [that the call] will produce a busy signal or will take longer to answer, as compared to those 911 calls routed to the 911 dispatcher(s) who are specifically designated to receive incoming 911 calls using traditional 911 dialing;"
 - c. that Vonage's 911 service is provided by third parties.

<u>Service Outage</u> – Section 2.3 of the TOS addresses service outages, many of which are unique to VoIP services such as Vonage's. This section explains that Vonage's service, in general, and 911 calling, in particular, is subject to disruption in the following circumstances:

- 1. <u>Power failure or disruption</u> (the TOS explain that after a power failure or disruption, the customer may have to reset or reconfigure the Vonage equipment) (§ 2.3.1);
- 2. Broadband Service / ISP Outage or Termination / Suspension or Termination by Vonage (the TOS explain that since Vonage's service requires a broadband Internet connection, Vonage's 911 calling service will not function if that connection is lost for whatever reason) (§ 2.3.2-4).

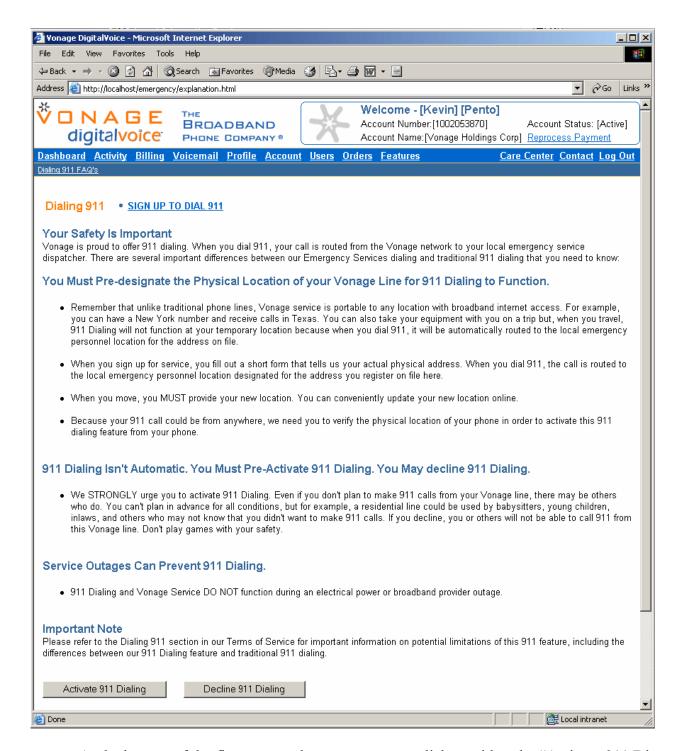
Other service characteristics – The TOS also explain the following other aspects of Vonage's emergency calling service:

- 1. that use of the service requires the customer to provide Vonage with correct address information (§ 2.5);
- 2. that the service must be re-activated if the customer changes her number ($\S 2.6$);

- 3. that the service must be reactivated if the customer moves or changes location (§ 2.7) (In other words, emergency calling is portable, but that if a Washington, DC based customer wishes to use the emergency calling feature while temporarily located in New York, the customer must revise the location information provided to Vonage. If the customer fails to do so, and dials "911" while in New York, the call will be routed to the Washington, DC PSAP assigned to the customer-provided address when service was initiated);
- 4. that service performance, including emergency calling performance, depends, at least in part, on the quality of the Internet connection provided by 3rd party ISPs (§ 2.8);
- 5. The TOS also explain in great detail the reasons for, and the consequences of, the inability of Vonage's emergency calling service to provide PSAPs with ANI and ALI information (§ 2.9 (ANI) and § 2.10 (ALI));
- 6. Finally, the TOS explain that Vonage's 911 calling service is not intended as a primary line or lifeline service: "You should always have an alternative means of accessing traditional E911 services" (§ 2.11).

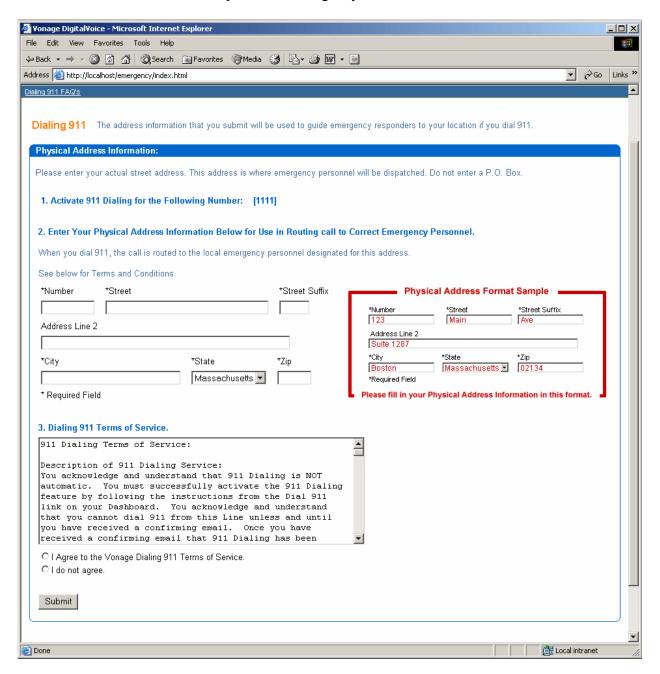
B. Information Disclosed During the Sign-Up Process

To ensure that its customers are fully aware of the limitations of its VoIP 911 service, Vonage also transmits this information during the sign-up process. Thus when a customer signs up for service, he or see encounters the following screen, which "STRONGLY urge[s]" the customer to sign-up for 911, but summarizes the limitations identified above:



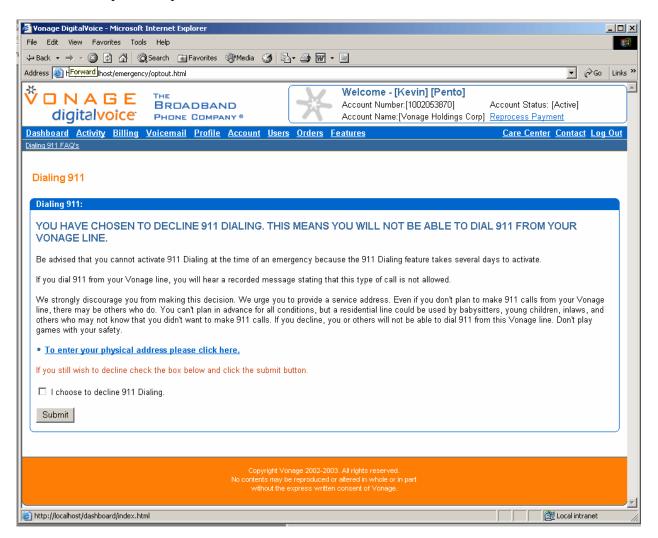
At the bottom of the first screen, the customer *must* click on either the "Activate 911 Dialing" or "Decline 911 Dialing" buttons. If the customer chooses to activate 911 Dialing, the customer then navigates to the following screen, which solicits physical address information,

which is used by Vonage's 911 vendor (Intrado) to identify the appropriate PSAP to route the call to in the event the customer places an emergency call:



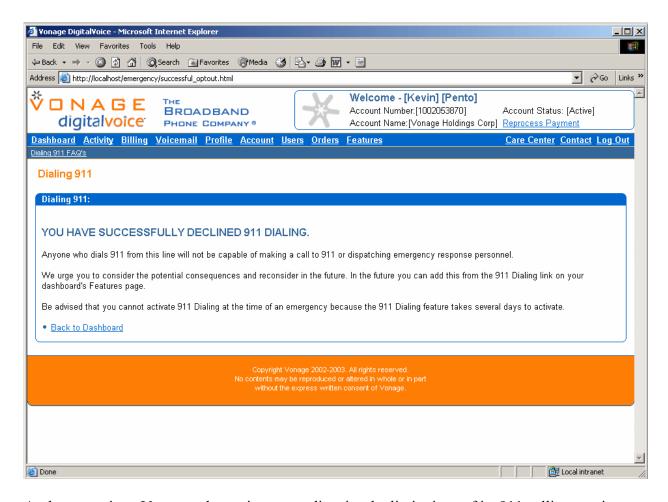
And not only does screen explain the importance of entering the correct address information, it contains the 911 Dialing Terms of Service summarized above, which the customer must "agree to" *for the second time* in order to receive the service.

If a customer declines to activate 911 Dialing, he or she is then routed through a series of screens that explain the potential ramifications of that decision:



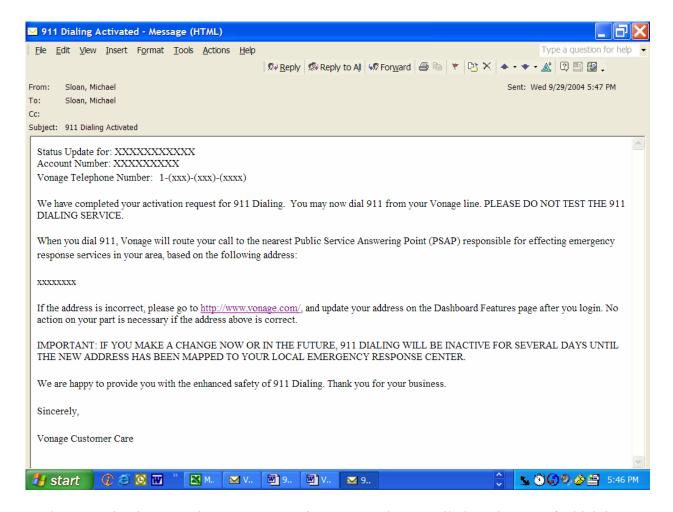
The above screen explains that the decision to opt out of 911 service can have potentially severe ramifications, and the customer is, once again, urged to sign-up for the service.

In order to fully opt-out of 911, the customer must affirmatively decline the service for a second time. Upon doing so, the customer receives yet an additional reminder (see below) that, "anyone who dials 911 from this line will not be capable of making a call to 911 or dispatching emergency response personnel." The customer is "urged to consider the potential consequences" of choosing to decline 911 service, and to consider signing up for the service in the future:



At the same time, Vonage takes pains not to disguise the limitations of its 911 calling service.

In addition to the disclaimers and disclosure of the limitations reviewed above, Vonage customers are provided with this information for a *third* time after they sign-up for the service via e-mail communications from Vonage:



And upon activating 911, the customer receives yet another e-mail alert, the text of which is provided below:

Account Number: XXXXXXXX

Telephone Number: 1-(xxx)-xxx-xxxx

Customer Name

Address

Dear Customer,

Thank you for requesting 911 Dialing for phone number Please read the following information carefully.

DIALING 911 IS NOT YET ACTIVATED ON YOUR PHONE LINE. THIS PROCESS MAY TAKE SEVERAL DAYS. DO NOT DIAL 911 FROM THIS PHONE LINE UNTIL YOU GET A CONFIRMATION EMAIL FROM US.

Please review these steps to better understand how Vonage DigitalVoice(tm)'s Dialing 911 feature works.

- . Using the information you provided, we will map your address and telephone number to your area's nearest Public Safety Answering Point ("PSAP").
 - . This process will be completed within several days.
- . We will email you a CONFIRMATION LETTER as soon as the 911 Dialing feature has been activated for . (Note that if you have multiple Vonage DigitalVoice(tm) numbers you MUST activate 911 Dialing for each number separately.)
- . When you dial 911 from your Vonage DigitalVoice(tm) phone, your call is routed from the Vonage DigitalVoice(tm) network over the Public Switch Telephone Network ("PSTN") to your PSAP's general number, where a trained professional will provide you with assistance.

PLEASE REMEMBER THAT 911 DIALING IS DIFFERENT THAN TRADITIONAL 911. We encourage you to login to your Vonage DigitalVoice(tm) account and click on Features in your Account Dashboard to learn more.

Please contact us by:

Email: customercare@vonage.com

Toll Free Phone: 1-VONAGE-HELP (1-866-243-4357)

Fax: 1732-333-1353

24 hours a day, 7 days a week

Thank You.

Vonage DigitalVoice(tm) Customer Care

C. Information Disclosed in Vonage's User Manual

Finally, Vonage discloses all of this information yet again in the User Guide it provides customers. Set forth in attachment 2 are the relevant pages from the User Guide, which explain the mechanics of signing up for Vonage's 911 service and the limitations of Vonage's service.

III. Conclusion

As the foregoing discussion explains, Vonage fully discloses all the features and limitations of its 911 service to its customers.

Attachment 1

Vonage Terms of Service Concerning 911

2. EMERGENCY SERVICES- 911 DIALING

2.1 Non-Availability of Traditional 911 or E911 Dialing Service

You acknowledge and understand that the Service does NOT support traditional 911 or E911 access to emergency services. Vonage does offer a limited 911-type service available only on Vonage Devices as described herein, but you acknowledge and understand that 911-type dialing is NOT automatic, that you must separately take affirmative steps, as described in this Agreement and on Vonage's website, to activate such 911-type dialing capabilities and that such 911-type dialing is different in a number of important ways (some, but not necessarily all, of which are described in this Agreement) from traditional 911 service. Vonage 911 dialing cannot be used in conjunction with a Vonage Soft Phone application and is only available on Vonage-certified Devices or Equipment. You agree to inform any household residents, guests and other third persons who may be present at the physical location where you utilize the Service of the non-availability of traditional 911 or E911 dialing from your Vonage Service and Device(s). If you activate Vonage 911-type dialing service, you agree to inform any household residents, guests and other third persons who may be present at the physical location where you utilize the Service as to the important differences and limitations of Vonage 911 dialing service as compared with traditional 911 or E911 dialing that are set forth in this Agreement.

2.2 Description of 911-Type Dialing Capabilities - Activation Required

Vonage does offer a 911-type dialing service in the U.S. (but may not offer such service in Canada) that is different in a number of important ways from traditional 911 service. You acknowledge and understand that 911-type dialing is NOT automatic. You must successfully activate the 911 dialing feature by following the instructions from the "Dial 911" link on your dashboard. You acknowledge and understand that you cannot dial 911 from this line unless and until you have received a confirming email. Once you have received a confirming email that 911 dialing has been successfully activated, you may dial 911 as needed. When you dial 911, your call is routed from the Vonage network to the Public Safety Answering Point (PSAP) or local emergency service personnel designated for the address that you listed at the time of activation. You acknowledge and understand that when you dial 911 from your Vonage equipment it is intended that you will be routed to the general telephone number for the PSAP or local emergency service provider (which may not be answered outside business hours), and may not be routed to the 911 dispatcher(s) who are specifically designated to receive incoming 911 calls using traditional 911 dialing. Vonage relies on third parties for the forwarding of information underlying such routing, and accordingly Vonage and its third party provider(s) disclaim any and all liability or responsibility in the event such information or routing is incorrect. As described herein, this 911-type dialing currently is NOT the same as traditional 911 or E911 dialing, and at this time, does not necessarily include all of the capabilities of traditional 911 dialing. Neither Vonage nor its officers or employees may be held liable for any claim, damage, or loss, and you hereby waive any and all such claims or causes of action, arising from or relating to 911 dialing unless it is proven that the act or omission proximately causing the claim, damage, or loss constitutes gross negligence, recklessness, or intentional misconduct on the part of Vonage. You agree to indemnify and hold harmless Vonage and its third party provider from any claim or action arising out of misroutes of 911 calls, including but not limited to your failure to follow

correct activation procedures for 911 calling or your provision to Vonage of incorrect information in connection therewith.

2.3 Service Outage

2.3.1 Power Failure or Disruption

You acknowledge and understand that 911 dialing does not function in the event of a power failure or disruption. Should there be an interruption in the power supply, the Service and 911 dialing will not function until power is restored. A power failure or disruption may require the Customer to reset or reconfigure equipment prior to utilizing the Service or 911 dialing.

2.3.2 Broadband Service / ISP Outage or Termination / Suspension or Termination by Vonage

You acknowledge and understand that service outages or suspension or termination of service by your broadband provider and/or ISP or by Vonage will prevent ALL Service including 911 dialing.

2.3.3 Service Outage Due to Suspension of Your Account

You acknowledge and understand that service outages due to suspension of your account as a result of billing issues will prevent ALL Service, including 911dialing.

2.3.4 Other Service Outages

You acknowledge and understand that if there is a service outage for ANY reason, such outage will prevent ALL Service, including 911 dialing. Such outages may occur for a variety of reasons, including, but not limited to those reasons described elsewhere in this Agreement.

2.3.5 Limitation of Liability and Indemnification

You acknowledge and understand that Vonage's liability is limited for any Service outage and/or inability to dial 911 from your line or to access emergency service personnel, as set forth in this document. You agree to defend, indemnify, and hold harmless Vonage, its officers, directors, employees, affiliates and agents and any other service provider who furnishes services to Customer in connection with this Agreement or the Service, from any and all claims, losses, damages, fines, penalties, costs and expenses (including, without limitation, reasonable attorneys fees) by, or on behalf of, Customer or any third party or user of Customer's Service relating to the absence, failure or outage of the Service, including 911 dialing and/or inability of Customer or any third person or party or user of Customer's Service to be able to dial 911 or to access emergency service personnel.

2.4 911 Dialing Requires Activation

You acknowledge and understand that 911 dialing does not function unless you have successfully activated the 911dialing feature by following the instructions from the "Dial 911"

link on your dashboard, and until such later date that such activation has been confirmed to you through a confirming email. You acknowledge and understand that you cannot dial 911 from this line unless and until you have received a confirming email.

2.5 Failure to Designate the Correct Physical Address When Activating 911 Dialing

Failure to provide the current and correct physical address and location of your Vonage equipment by following the instructions from the "Dial 911" link on your dashboard will result in any 911 communication you may make being routed to the incorrect local emergency service provider. This must be the actual physical street address where you are located, not a post office box, mail drop or similar address.

2.6 Requires Re-Activation if You Change Your Number or Add or Port New Numbers

You acknowledge and understand that 911 dialing does not function if you change your phone number or (for such newly added or ported numbers) if you add or port new numbers to your account, unless and until you have successfully activated the 911 dialing feature for your changed, newly added or newly ported number by following the instructions from the "Dial 911" link on your dashboard, and until such later date that such activation has been confirmed to you through a confirming email. Although you may have activated 911 dialing with your former Vonage phone number, you must separately activate 911 dialing for any changed or newly added or ported number.

2.7 Requires Re-Activation if You Move or Change Location

You acknowledge and understand that 911 dialing does not function properly or at all if you move or otherwise change the physical location of your Vonage Device to a different street address, unless and until you have successfully activated the 911 dialing feature following the instructions from the "Dial 911" link on your dashboard, and until such later date that such activation has been confirmed to you through a confirming email. 911 dialing must be reactivated although you may have activated 911 dialing using your former address, and you must separately activate 911 dialing for any new physical address. Failure to provide the current and correct physical address and location of your Vonage equipment will result in any 911 dialing you may make being routed to the incorrect local emergency service provider

2.8 Possibility of Network Congestion and/or Reduced Speed for Routing or Answering 911

Due to the technical constraints on the manner in which it is possible to provide the 911 dialing feature for Vonage Service at this time, you acknowledge and understand that there is a greater possibility of network congestion and/or reduced speed in the routing of a 911 communication made utilizing your Vonage equipment as compared to traditional 911 dialing over traditional public telephone networks. You acknowledge and understand that 911 dialing from your Vonage equipment will be routed to the general telephone number for the local emergency service provider (which may not be answered outside business hours), and will not be routed to the 911 dispatcher(s) who are specifically designated to receive incoming 911 calls at such local provider's facilities when such calls are routed using traditional 911 dialing. You acknowledge and understand that there may be a greater possibility that the general telephone number for the

local emergency service provider will produce a busy signal or will take longer to answer, as compared to those 911 calls routed to the 911 dispatcher(s) who are specifically designated to receive incoming 911 calls using traditional 911 dialing. You acknowledge and accept that Vonage relies on third parties for the forwarding of information underlying such routing, and accordingly Vonage and its third party provider(s) disclaim any and all liability or responsibility in the event such information or routing is incorrect. Vonage or its officers or employees, may not be held liable for any claim, damage, or loss, and you hereby waive any and all such claims or causes of action, arising from or relating to 911 dialing unless it is proven that the act or omission proximately causing the claim, damage, or loss constitutes gross negligence, recklessness, or intentional misconduct on the part of Vonage.

2.9 Automated Number Identification

At this time in the technical development of Vonage 911 dialing, it may or may not be possible for the Public Safety Answering Point (PSAP) and the local emergency personnel to identify your phone number when you dial 911. Vonage's system is configured in most instances to send the automated number identification information; however, one or more telephone companies, not Vonage, route the traffic to the PSAP and the PSAP itself must be able to receive the information and pass it along properly, and PSAPs are not yet always technically capable of doing so. You acknowledge and understand that PSAP and emergency personnel may or may not be able to identify your phone number in order to call you back if the call is unable to be completed, is dropped or disconnected, or if you are unable to speak to tell them your phone number and/or if the Service is not operational for any reason, including without limitation those listed elsewhere in this Agreement.

2.10 Automated Location Identification

At this time in the technical development of Vonage 911 Dialing, it is not possible to transmit identification of the address that you have listed to the Public Safety Answering Point (PSAP) and local emergency personnel for your area when you dial 911. You acknowledge and understand that you will need to state the nature of your emergency promptly and clearly, including your location, as PSAP and emergency personnel will NOT have this information. You acknowledge and understand that PSAP and emergency personnel will not be able to find your location if the call is unable to be completed, is dropped or disconnected, if you are unable to speak to tell them your location and/or if the Service is not operational for any reason, including without limitation those listed elsewhere in this Agreement.

2.11 Alternative 911 Arrangements

You acknowledge that Vonage does not offer primary line or lifeline services. You should always have an alternative means of accessing traditional E911 services.

You are responsible for, and shall pay, any applicable federal, state, provincial, municipal, local or other governmental sales, use, excise, value-added, personal property, public utility or other taxes, fees or charges now in force or enacted in the future, that arise from or as a result of your subscription or use or payment for the Service or a Device. Such amounts are in addition to payment for the Service or Devices and will be billed to your credit card as set forth in this

Agreement. If you are exempt from payment of such taxes, you shall provide Vonage with an original certificate that satisfies applicable legal requirement attesting to tax-exempt status. Tax exemption will only apply from and after the date Vonage receives such certificate.

Attachment 2

Vonage User Guide Section Concerning 911 Activation

Table of Contents What's inside the guide

Chapter 1 - Introduction to your Broadband Telephone Service

What is VoIP?	pg 6
Making Calls with your Broadband Telephone	pg 7

Chapter 2 - Free Features included with your Service

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pg 22

Chapter 3 - Cool Extras available with your Service

Enhanced 411	pg 24
Fax Lines	pg 25
Virtual Phone Numbers	pg 26
Toll Free Plus	pg 27
Add More Lines	pg 28

Activate 911 Dialing

Sign Up Is Easy

Login to your online web account with your Username and Password at our website. Make sure you activate 911 Dialing. Click on Features and follow the instructions in the red box that says Dialing 911. It takes several days to active 911 Dialing after completing the form.

Your Safety Is Important to Us

We offer 911 emergency dialing. When you dial 911, your call is routed from our network to the Public Safety Answering Point (PSAP) for your area. There are several important differences between our Emergency Services dialing and traditional 911 dialing that you need to know:

You Must Pre-designate The Physical Location Of Your Line For 911 Dialing to Function

Remember that unlike traditional phone lines, your service with us is portable to any location with broadband Internet access. For example, you can have a New York number and receive calls where you live or work in Texas. You can also take your equipment with you on a trip, but when you travel, 911 Dialing will automatically route your call to the local emergency personnel location for the address on file, not your temporary location.

When you sign up for 911 Dialing service, you fill out a short form that tells us your actual physical address. When you dial 911, the call is routed to the local emergency personnel location designated for the address you register on file here. When you move, you MUST provide your new location. You can conveniently update your new location online. It may take several days to update your record.

Since your 911 call could be from anywhere, we need you to verify the physical location of your phone in order to activate this 911 dialing feature from your phone.

911 Dialing Isn't Automatic. You Must Pre-Activate 911 Dialing. You May Decline 911 Dialing.

We STRONGLY urge you to activate 911 Dialing. Even if you don't plan to make 911 calls from your line, there may be others who do. You can't plan in advance for all situations. For example, a residential line could be used by babysitters, young children, inlaws, and others who may not know that you didn't want to make 911 calls. If you decline 911 Dialing, you or others will not be able to call 911 from this line. Don't play games with your safety. Register today.

Your Call Will Go To A General Access Line At The Public Safety Answering Point (PSAP)

This is different from the 911 Emergency Response Center where traditional 911 calls go.

Activate 911 Dialing (Continued)

This means your call goes to a different phone number than traditional 911 calls. Also, you will need to state the nature of your emergency promptly and clearly, including your location and telephone number, as PSAP personnel will NOT have this information at hand.

Service Outages Can Prevent 911 Dialing

911 Dialing and our Service DO NOT function during an electrical power or broadband provider outage.

Important Note

Please refer to the Dialing 911 section in our Terms of Service for important information on potential limitations of this 911 feature, including the differences between our 911 Dialing feature and traditional 911 dialing.

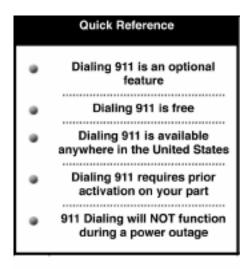


Exhibit 11

Vonage's User Guide

Record The Information Below For Easy Reference

Phone Number:	
User Name:	
Password:	
Voicemail Local Access Number:	

Welcome

Unleash Your Phone

This User Guide will familiarize you with your new Broadband Telephone Service. Many of the free features included with your service are explained in detail. In addition, you can learn more about cool extras which can be added to your service.

For assistance with installation of your telephone adapter or troubleshooting common problems, please refer to the Installation and Troubleshooting Guide, or the Quick Installation Guide included with your welcome kit.

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Add More Lines	pg 28

Chapter 1 – Introduction to your Broadband Telephone Service

What is VoIP?	pg 6
Making Calls with your Broadband Telephone	pg 7

Once you plug in your Phone Adapter, the only things you'll lose are expensive and confusing phone bills. Unlike many Voice-over-IP services, you don't need headphones or your computer. Just use your standard touch-tone phone, talk as much as you want and rack up the savings.

What is VoIP?

Your Phone Unleashed

Send Your Voice Over the Internet

For years you've sent written messages through the Internet with email. Now you can do the same thing with your voice messages. VOIP (or Voice Over Internet Protocol) is the new way to make and receive phone calls. Your Broadband Telephone Service converts your phone calls into data that zips through your high-speed Internet connection. The big advantage is that you can call anywhere at anytime for less money. And it's better than your traditional line because it expands the power of your phone.

Now Your Number Can Go Everywhere You Do

Your Broadband Telephone Service works with any touch-tone phone, corded or cordless. You can make calls to any phone on Earth. The person you're calling doesn't need to use our service or have an Internet connection on their side. Of course, if they do use our service, your calls to them will be free. We send you a free adapter when you sign up for service. Setup is easy. Plug it in and it installs automatically.

Making Phone Calls

Just Pick Up The Phone and Dial

Using our phone service is easy. Talk on your phone just as you always have.

Dial it YOUR Way



Your Broadband Telephone Service gives you the flexibility to dial the way you want to. Use 7, 10 or 11 digits. Its simple!

For calls within your own area code, you may dial 7, 10 or 11 digits. For example, if your Broadband Telephone number is

1-212-555-4321, and you wanted to call your friends at 1-212-555-1234, you could dial any of the following:

- 555-1234
- 212-555-1234
- 1-212-555-1234

When dialing outside your own area code, you may use 10 or 11 digits. Don't worry if you forget to dial the "1" -- we'll do it for you!

These instructions apply no matter who or where you are calling; across the street or across the continent. There are no special codes to punch in. For customers without Unlimited plans, our low per minute rate will apply to calls if you exceed your plan limit.

Chapter 2 – Free Features included with your Service

Activate 911 Dialing	pg 9-10
Web Account - Real-time account management	pg 11
Online Billing	pg 12
Voicemail	pg 13
Call Waiting	pg 14
Caller ID with Name	pg 15
Caller ID Block (*67)	pg 16
Repeat Dialing	pg 17
Call Transfer	pg 18
Call Return (*69)	pg 19
3-Way Calling (conference)	pg 20
International Call Block	pg 21
Network Availability Number	pg 22

Amazing features that cost nothing to use. It's not what a typical phone company would do. But then again, we're not your typical phone company

How can so much cost so little?

We did it to make our customers happy and to worry our competitors.

It seems to be working.

Activate 911 Dialing

Sign Up Is Easy

Login to your online web account with your Username and Password at our website. Make sure you activate 911 Dialing. Click on Features and follow the instructions in the red box that says Dialing 911. It takes several days to active 911 Dialing after completing the form.

Your Safety Is Important to Us

We offer 911 emergency dialing. When you dial 911, your call is routed from our network to the Public Safety Answering Point (PSAP) for your area. There are several important differences between our Emergency Services dialing and traditional 911 dialing that you need to know:

You Must Pre-designate The Physical Location Of Your Line For 911 Dialing to Function

Remember that unlike traditional phone lines, your service with us is portable to any location with broadband Internet access. For example, you can have a New York number and receive calls where you live or work in Texas. You can also take your equipment with you on a trip, but when you travel, 911 Dialing will automatically route your call to the local emergency personnel location for the address on file, not your temporary location.

When you sign up for 911 Dialing service, you fill out a short form that tells us your actual physical address. When you dial 911, the call is routed to the local emergency personnel location designated for the address you register on file here. When you move, you MUST provide your new location. You can conveniently update your new location online. It may take several days to update your record.

Since your 911 call could be from anywhere, we need you to verify the physical location of your phone in order to activate this 911 dialing feature from your phone.

911 Dialing Isn't Automatic. You Must Pre-Activate 911 Dialing. You May Decline 911 Dialing.

We STRONGLY urge you to activate 911 Dialing. Even if you don't plan to make 911 calls from your line, there may be others who do. You can't plan in advance for all situations. For example, a residential line could be used by babysitters, young children, inlaws, and others who may not know that you didn't want to make 911 calls. If you decline 911 Dialing, you or others will not be able to call 911 from this line. Don't play games with your safety. Register today.

Your Call Will Go To A General Access Line At The Public Safety Answering Point (PSAP)

This is different from the 911 Emergency Response Center where traditional 911 calls go.

Activate 911 Dialing (Continued)

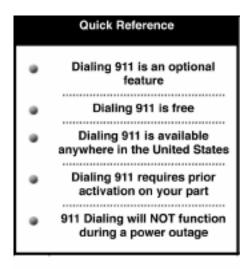
This means your call goes to a different phone number than traditional 911 calls. Also, you will need to state the nature of your emergency promptly and clearly, including your location and telephone number, as PSAP personnel will NOT have this information at hand.

Service Outages Can Prevent 911 Dialing

911 Dialing and our Service DO NOT function during an electrical power or broadband provider outage.

Important Note

Please refer to the Dialing 911 section in our Terms of Service for important information on potential limitations of this 911 feature, including the differences between our 911 Dialing feature and traditional 911 dialing.



Web Account

Real-Time Online Account Management

With Free Real-Time Online Account Management, you're in control of your account. Access your account 24/7 to check call activity, billing, manage voicemail, and edit your user information. And because it's available in real-time, you get the most accurate and up-to-date information.

Dashboard:

The "dashboard" of your web account is the one online location where you can get all the information you need about your account. The dashboard lists your ten most recent calls made and received. You'll find account information, order information and service announcements. The dashboard also links to Call Forwarding Options that allow you to log into your voicemail.

Activity:

The activity page lists all calls made and received in the last seven days. Days are displayed consecutively regardless of whether or not calls were made on a particular day.

Billing:

The billing page provides information such as the billing cycle, next payment date and monthly charges to date. You can access three months of billing and an itemized call detail list that updates within moments of any call activity. You can also request credits from this section.

Voicemail:

The voicemail page allows you to manage your messages and even listen to them online. In addition, you can set up email notification for voice messages and change your voicemail PIN (Personal Identification Number).

Account:

The account page provides account and user information. Here you can edit your account information and password.

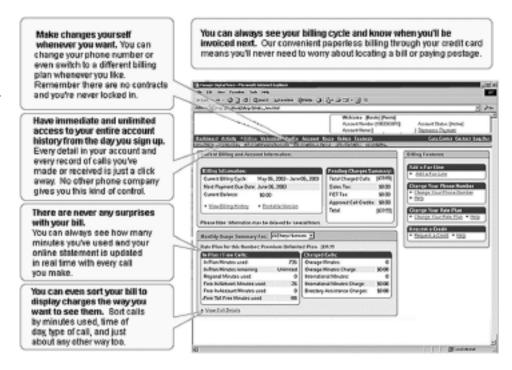
Online Billing

Extraordinary Control And Account Management

You have extraordinary control over your account with our feature-rich, online billing system. Get real-time billing information plus real-time account data 24/7 at the click of a button. Online billing means no surprises every month as well as accurate record keeping, all in a completely paperless environment. A printer friendly version is available in your web account.

Easy To Understand Online Billing Summary

Login to your Online Billing Summary anytime and get all the information you need in real-time. It's password protected, so you know it is secure. Plus, your statement provides all you need to know to manage your account efficiently and effectively.



Voicemail

Now Voicemail Goes Beyond Your Phone

Get Your Messages by Phone, Web, or Email.

Play Back Your Messages Online

Now you can check your voicemails without checking your phone. You can check your messages online and even play them back through your computer. All the popular media player formats are supported. It's a great feature when you're away from home.

Get Emails When You Have New Messages

Our Voicemail is smart enough to track you down the way you choose. We can send you an email notifying you every time you receive a voicemail. You can also get email notifications with the actual message attached. Now you can forward voicemails to others as email or even save them to your PC's hard drive. Turn these features on or off anytime you want. Stay in touch with the click of a mouse.

Access Your Voicemail Box From Anywhere

Check your messages by phone with easy phone button menus. Check messages by phone when you're away with free local access numbers in area codes across the U.S.A. Check your messages online from any computer with Internet access. Check your messages with sound file attachments in your email. Now you can keep in touch with others on your own terms.

Customize Your Voicemail Controls

Activate email notification at the touch of a button. Turn email attachments on or off. Choose a new PIN for voicemail access whenever you like.



Call Waiting

Never Miss An Important Phone Call Again

Call Waiting is great for busy people. It lets you place a call on your number and then answer a second incoming call. You can alternate between the two calls as much as you want for as long as you like. It's like having two phone lines for the price of one.

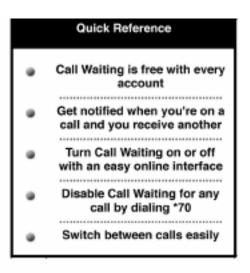
Switching Between Calls Is Easy

Using Call Waiting is as simple as pressing a button. While you are on the phone, a beep tone alerts you to another incoming call. See the incoming number if you have caller ID on your phone, then press the flash button or switch hook on your phone to enable Call Waiting. The first call will be placed on hold while you answer the second call.

It's that easy.

Disable Call Waiting Two Easy Ways

Use your easy online interface to turn Call Waiting on or off. If you want to keep Call Waiting active but want to turn it off for a single call, just press *70 before you dial the number. Call Waiting will be temporarily disabled until you hang up.



Caller ID with Name

See The Caller's Number Before You Take The Call

You can tell who is calling you before you answer the phone with any Caller ID-enabled phone device. Your Caller ID feature provides the name and number of the party calling so you can elect to take the call or not. It's an excellent way to eliminate calls from people you don't know or manage your time better so that you can take the calls you want.

Protect Your Privacy

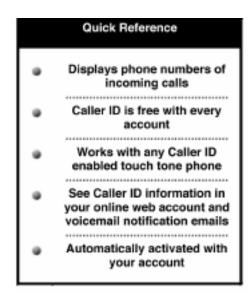
Avoid unwanted calls from telemarketers, strangers or people you simply do not wish to talk to immediately. That's what Caller ID can provide. This feature is always on and can help you identify incoming callers quickly and easily.

With Caller ID You're In Control

Caller ID is like having a private secretary to screen your calls. Calls that you don't take will go automatically to voicemail. It also works seamlessly with Call Waiting, displaying the new caller's telephone number when you hear the Call Waiting tones. Best of all, Caller ID numbers are displayed right in the subject line of any email that you receive when you activate Voicemail Notification by Email.

Caller ID Is Free

Like so many valuable features, Caller ID is free with every calling plan.



Caller ID Block (*67)

Protect Your Privacy

Hide Your Caller ID Information From Anyone You Call

Caller ID Block Helps You Block Your Identity When You Call

Caller ID Block, also known as *67, allows you to block your identity when you are making a call. This feature is available on a call by call basis.

Activate Caller ID Block Each Time You Call

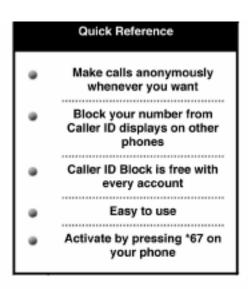
You can activate Caller ID Block each time you make an outgoing call. Simply pick up your handset, listen for the dial tone and press *67. Then, wait for the dial tone and dial the number you are calling. It's that simple. Caller ID Block is in effect for that call.

Protect Your Privacy

Caller ID Block helps you make discreet calls. If the party you are trying to reach has Caller ID, they will not see your number with Caller ID Block. Your call will go through seamlessly and anonymously.

Caller ID Block Is Free

This is a free service with your account.



Repeat Dialing

We'll Keep Dialing So You Don't Have To

Call Back When A Number Is Busy

Repeat dialing is a way to call back automatically when the number you are trying is busy. Activating repeat dialing is a snap. You just dial #5 to activate this feature when you hear a busy signal and hang up when you hear a beep tone. Then, you will be called back when the number you are trying to reach is free and you will be connected. This call back feature will last for 30 minutes.

Continue To Use Your Service While Repeat Dialing Is Working

One of the great things about repeat dialing is that you may continue to use your line until your call back call is connected. So don't drop what you are doing because of that busy signal. Your call will be connected when both you and the party you are trying to call are free.

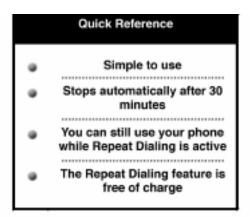
There's No Cost To You

Like our other valuable features, repeat dialing is free to you.

Important Note

Some telecommunications carriers are not yet compatible with Repeat Dialing. In these rare cases, Repeat Dialing may not be activated when you press #5.

Hear a Busy Signal? Press #5



Call Transfer

Transfer A Call Anywhere At The Touch Of A Button

Call transfer lets you direct calls anywhere you want in the U.S.A. and Canada. After you answer a call, you may have your call transferred to your cell phone, to another land line or to any U.S.A. or Canadian phone number of your choosing. Your calls are transferred immediately.

Transfer Calls As You Receive Them

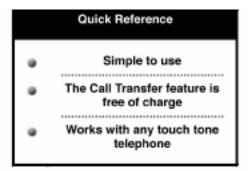
Call transfer also allows you to transfer calls as they come in. This will allow you to transfer a call to someone else when you want. Since call transfer is so easy and seamless, you can use it whenever you want.

How To Transfer Calls

It's easy to transfer a call just press the flash button or switch hook on your telephone and dial #90. Dial the number where you want the call transferred. Then dial # and you will hear a dial tone. Hang up the phone and the transfer will take place.

Announce Your Transfer

You can also announce your transfer. Just press the flash button or switch hook on your telephone and dial #91. Dial the number where you want the call transferred. When the person picks up their phone announce the call. When you are ready to transfer your caller simply press # and hang up.



Call Return (*69)

Never Miss An Important Phone Call Again

Convenient Automatic Call Return (*69)

Have you ever just missed answering a call? Call Return, also known as *69, returns your last incoming call automatically.

No Extra Charges For Call Return *69

Some large telephone companies charge close to a dollar every time you dial *69. These extra charges really can add up. But with us there are no extra charges to use the Call Return (*69) feature. If you use Call Return frequently, this could represent big savings for you. Use it once a month. Use it 500 times. Use it as much as you like. There's no meter running.

Returning The Call Is Up To You

Call Return (*69) is very user friendly. When you press *69 a voice prompt will announce the return call number, a particularly useful feature if you don't have Caller ID on your phone. Then, the prompt will ask you if you wish to return the call. It's that simple.

Dialing *69 Has No Effect On Your Rate Plan

Your costs for the returned calls are based on your monthly rate plan. For unlimited rate plan customers, *69 calls are included as part of your monthly service. Rated plan customers are charged nothing if the returned call is local or regional. Rated plan customers are charged within their monthly long distance minutes if it is a long distance returned call.

Easily return missed calls at no extra charge A voice activated call return menu lets you decide if the call should be returned Automatic number read back An automatic date and time stamp lets you know when you missed the call Works with United States and Canadian numbers

3-Way Calling

Easily Add A Third Caller To Any Conversation

Communicate Where You Want When You Want

Setting up a 3-Way Call couldn't be easier. Dial your first party normally. Then just press the Flash Button or Switch Hook on your phone and dial the second party. Press Flash or Switch Hook again, and you're all connected. It's as simple as that!

We always go the extra mile to save you money, and 3-Way Calling is no exception to the rule. Most carriers charge extra to make a 3-Way Call. We think you deserve better than that, so 3-Way Calls are free.

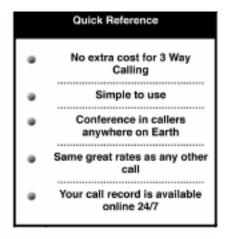
For billing purposes, we treat a 3-Way Call as two separate calls that happen at the same time. So let's say that you have our Premium Unlimited Plan. You can call a friend in Connecticut, then dial in a pal in Florida. Because your calls are unlimited, this 3-Way Call costs you nothing extra. The same is true for your friends in Canada.

Make 3 - Way Calls Anywhere You Want

3-Way Calling lets you connect 3 parties anywhere on Earth. What if your pals are in London? Any call outside of the U.S.A. or Canada is billed incrementally based on that area's rate. In this case you would still be responsible for paying the international rate to London, but there would be no extra fees for making the 3-Way Call.

Convenient Online Record Keeping

Like with any other calls you make, you can always review your dialing records online in your web account. Each call will show up separately and the number of minutes used to each party will display in a separate row. So you'll always be in control, 24 hours a day, 365 days a year.



International Call Block

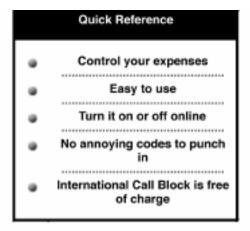
Stop Outgoing International Calls

Free International Call Block

This feature lets you block and unblock international dialing. You can activate this feature and de-activate it through your web account at any time.

Visitors coming to your home or office and you don't want to pay for their hour long calls to Timbuktu? Block your international calls while they are visiting and turn it back on when they're gone.

Note: Enabling International Call Block will also result in blocking calls to 411.



Set Your Network Availability Number

And Never Miss a Call

Don't miss any calls even if your Internet connection goes down

You're protected. Now you don't have to be inconvenienced if your Internet connection fails. Your calls will be automatically forwarded to the phone number of your choice in the event your Internet connection is disrupted or your telephone adapter is disconnected. If Call Forwarding is enabled, all of your calls will be forwarded using your Call Forwarding settings. If you don't have Call Forwarding enabled, we will forward all calls to the number you register as your Network Availability Number.

Your Network Availability Number is similar to Call Forwarding, except that it's activated only when your Internet connection is disrupted or your telephone adapter is disconnected. Once activated, calls to your Broadband Telephone number will forward to the number you choose until your Internet connection is restored.

Setup Is Painless

- 1. Login to Web Account
- 2. Click on the "Features" tab from your Dashboard



It doesn't cost extra to use our handy Network Availability feature. For Unlimited Plan customers, calls are included as part of your monthly service. Rated plan customers are included as well unless if the forwarded call is not within their monthly allotted minutes.

Chapter 3 - Cool Extras available with your Service

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We said we would redefine communications, and we meant it. Your Broadband Telephone Service gives you unparalleled choice and control over where and how you use your phone.

Enhanced 411

Just 99¢ Per Call

Our enhanced directory assistance fits your busy lifestyle and gets you the information you need on demand. Like every one of our features, it's powerful, easy, and inexpensive.

For just 99¢ you get access to any listings in the U.S.A., Canada and Puerto Rico. Each 411 call that you make from your phone gets you two listings. What's more, our Directory Assistance Operators speak English and Spanish.

Easy Search

Searching for listings couldn't be easier—even if you don't have a name. Need a Japanese restaurant in Miami? How about a Florist in Sacramento? We offer category and keyword searches that find your listings when you don't even have a name, address, or telephone number. Sophisticated databases also give you reverse search features like phone numbers by address or addresses by phone number.

We can expand the geographic area of your search easily. Ask for a plumber in Philadelphia and we can find plumbers outside the city limits and in nearby surrounding counties too. You don't have to give the operator perfect spellings either. We can even help you with partial or incorrect spellings when you aren't sure. Our enhanced 411 is powerful enough to find you what you need.

Enhanced Features

Enhanced 411 doesn't stop with directory listings. We can tell you what movies are playing at local theaters, and when the shows begin. Our customers can spend less time in airports too, because our Airline Flight Times are updated around the clock. So when your flight is delayed, up to the minute information is just a 3-digit phone call away. Here's everything that Enhanced 411 can give you:

- Residential or business phone listings
- Movie Listings
- Weather Forecasts
- Horoscopes
- Sports Scores and News
- Stock Quotes and Information
- Lottery Results
- Airline Flight Times
- Time of Day Anywhere on Earth



Fax Lines

It's Easy To Set Up

Sign up for a fax line through your web account. Just plug your fax into Line 2 of your Digital Phone Adapter, and you can begin sending or receiving faxes. There are no known brands of fax machines that are not compatible with our service.

Get A Complete Record Of Your Faxes Online

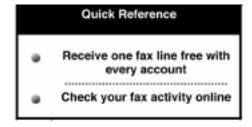
Since your dedicated fax line has a dedicated fax number it's easy to keep track of your incoming and outgoing faxes on your account dashboard. This allows you to check you fax activity online, anytime, anywhere.

■ Residential Accounts

Get a dedicated fax line for only \$9.99 per month

Check your fax activity online

■ Business Accounts



Virtual Phone Numbersm

Have Dedicated Numbers Outside Your Area Code

Virtual Phone Numbers are very inexpensive secondary numbers that ring to your primary line. The advantage is that people outside your local calling area can call you for the price of a local call if you choose a virtual phone number in their area code. Virtual numbers make it easier for people to keep in touch with you because they can call you for the price of a local call.

How Does It Work?

They work a lot like email address aliases. In the same way that you can have more than one email address point to the same email account, you can have more than one number link to your primary number. Behind the scenes, our Call Routing Network points your Virtual Number calls to your primary line. This transfer is just as fast and seamless as any other phone call.

How Can I Get A Virtual Number?

Make sure that you have an active account and phone number, because you can't have a Virtual Number without a primary number!

Add a Virtual Number from the Features Tab on your account Dashboard.

Tell everyone about your new number. It's great for them and inexpensive for you.

Quick Reference

How can I use this?

Let's say that you live in New York and your primary number is in area code 718. Your mom lives in Florida. Her area code is 561. You could get a secondary virtual phone number in area code 561 that rings to your 718 line. Then mom doesn't have to pay long distance charges when she calls you.

You can have as many Virtual Numbers as you like, and they're activated immediately

Business users love Virtual
 Numbers too

Imagine having business cards with New York, Chicago, and Los Angeles satelite office numbers. Now local clients can dial you without dialing long distance. And you get the local presence without all the expensive overhead. It's great for growing your business, and we make it possible.

Toll Free Plussm Numbers

Now Toll Free Numbers Are Available And Affordable For Everyone

Toll Free Numbers Are Now Available To Everyone For Only \$4.99 Per Month

At just \$4.99 per month, a Toll Free Plussm number lets your incoming caller call you at no charge from anywhere, anytime. 100 incoming minutes are included every month and each minute after that is only 4.9 cents. With Toll Free Plussm, there's no need to put off getting your own toll-free number.

Signing Up Is A Snap

Just click on the Add a Toll Free Plussm number from the Features Tab on your account Dashboard. Make sure that you have an active account and phone number, because you can't have a Toll Free Plussm number without a primary number.

A Powerful Combination Of Functionality, Features And Low Fees

Ask any business owner, and they'll tell you that a toll-free number is indispensable. Now Toll Free Plussm numbers give you the opportunity to have toll-free service with powerful features for your business or for your home.

Best of all, you manage everything through our sleek and intuitive online interface. Now you can choose how to manage all of your calls.



Add More Lines To Your Account

Add More Lines For Less

You can add multiple phone numbers to your account. You'll save money on each additional line and you'll see all of your calling in one convenient bill. That kind of savings can really add up.

Have As Many Lines As You Like

We don't limit your calls and we don't limit the number of lines you can add to your account. Please remember that you'll need 90Kbps of available bandwidth for every phone line that will be in use at the same time.

Ordering More Numbers is Easy

JUST LOGIN TO YOUR ONLINE ACCOUNT AND PICK THE NUMBERS YOU WANT. YOU'LL HAVE THE OPTION OF ACQUIRING AN ADDITIONAL DIGITAL PHONE ADAPTER OR ADDING THE LINES TO THE DIGITAL PHONE ADAPTER YOU ALREADY HAVE. PLUS, YOU CAN SHIP NEW EQUIPMENT ANYWHERE YOU WANT IN THE U.S.A. AND STILL GET EVERYTHING IN ONE CONVENIENT ONLINE BILL.

